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Nos. 98-___, 98-___

In The

Supreme Court of the United States

October Term, 1997

ROBERT D. HANNIGAN, WARDEN, *et al.*,

Petitioners,

v.

RAYMOND F. STANSBURY,

Respondent.

CHARLES SIMMONS, SECRETARY OF CORRECTIONS, *et al.*,

Petitioners,

v.

MICHAEL A. BANKES,

Respondent.

On Petition For Writs Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR WRITS OF CERTIORARI

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Dept. of Corrections
900 Jackson St., Suite 400
Topeka, Kansas 66612
(785) 296-4508

CARLA J. STOVALL
Attorney General

STEPHEN R. MCALLISTER
Special Asst. Attorney General
(Counsel of Record)

301 S.W. 10th Avenue
Topeka, Kansas 66612-1597
(785) 296-2215

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Is a state department of corrections regulation that implements a statutory directive that all good time credits "shall be awarded on an earned basis", or that defines what constitutes "good behavior" and the consequences of misbehavior, a "law" for *ex post facto* purposes?

2. Does a state department of corrections regulation that changes the awarding of good time credits from "a projected basis" to "an earned basis", as required by the controlling statute, and solely for purposes of determining an inmate's conditional release date, without any negative impact on credits accumulated prior to the regulation's effective date or the total amount of credits available, violate constitutional *ex post facto* principles?

3. Does a state department of corrections regulation that changes prospectively the good time credit losses for inmate misconduct, but which does not alter the credits already accumulated nor the total amount of credits available, violate constitutional *ex post facto* principles?

4. Does a state department of corrections regulation that changes prospectively the definition of good behavior for purposes of awarding earned good time credits by, for example, requiring convicted sex offenders to participate in mental health treatment programs as an aspect of good behavior, but which does not alter the credits already accumulated nor the total amount of credits available for good conduct, violate constitutional *ex post facto* principles?

LIST OF PARTIES

Hannigan v. Stansbury:

Robert D. Hannigan, Warden; David R. McKune; William Cummings; Anthony McElroy; Jamie Lanza; and J. Wark

Simmons v. Bankes:

Charles Simmons, Secretary, Kansas Department of Corrections; Robert D. Hannigan; Mr. Wilson, Mr. Taylor, Mr. Robinson, Mr. Stokes, Mr. Ron Hicks, and Kansas Department of Corrections

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 4

REASONS FOR GRANTING THE WRIT 13

I. The Kansas Supreme Court's Decisions Are Contrary To Decisions Of Federal Courts Of Appeal And Other State Courts Of Last Resort 13

A. The Lower State And Federal Courts Have Divided Over What Regulations Affecting Inmates Are "Laws" For *Ex Post Facto* Purposes And What Changes Affecting Good Time Credits Violate Constitutional *Ex Post Facto* Principles 13

B. The Kansas Supreme Court's Decisions Address Important, Unresolved *Ex Post Facto* Questions On Which Prison Authorities And The Lower Federal And State Courts Require Guidance 21

II. The Kansas Supreme Court's Decisions Are Contrary To This Court's *Ex Post Facto* Decisions 22

CONCLUSION 29

APPENDICES 1a

TABLE OF AUTHORITIES

Page

CASES

Arnold v. Cody, 951 F.2d 280 (10th Cir. 1991) 14

Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991) 15

Bailey v. Noot, 503 U.S. 952 (1992)..... 10, 15, 21, 23

Beck v. Kansas Adult Authority, 241 Kan. 13, 735 P.2d 222 (1987) 5

Beebe v. Phelps, 650 F.2d 774 (5th Cir. 1981)..... 14

California Dept. of Corrections v. Morales, 514 U.S. 499 (1995) ..... *passim*

Chauvin v. Erickson, 998 F.2d 617 (8th Cir. 1993) ..14, 18

Collins v. Youngblood, 497 U.S. 37 (1990) ..... *passim*

Department of Revenue of Montana v. Kurth Ranch, 511 U.S. 767 (1995) 28

Dobbert v. Florida, 432 U.S. 282 (1977) 23, 25

Dominique v. Weld, 73 F.3d 1156 (1st Cir. 1996) 10, 14, 15, 19, 23

Ewell v. Murray, 11 F.3d 482 (4th Cir. 1993) 14, 15, 18, 19, 23

Francis v. Fox, 838 F.2d 1147 (11th Cir. 1988) 15

Gilbert v. Peters, 55 F.3d 237 (7th Cir. 1995)..... 18

Hudson v. United States, 522 U.S. ___, 118 S. Ct. 488 (1997) 28

Jones v. Murray, 962 F.2d 302 (4th Cir. 1992)..... 18

Kansas v. Hendricks, 521 U.S. ___, 117 S. Ct. 2072 (1997) 15, 24, 28

TABLE OF AUTHORITIES – Continued

Page

Knox v. Lanham, 895 F. Supp. 750 (D. Md. 1995). 14

Knuck v. Wainwright, 759 F.2d 856 (11th Cir. 1985) 14

Lindsey v. Washington, 301 U.S. 397 (1937) 23, 26

Lynce v. Mathis, 519 U.S. ___, 117 S. Ct. 891 (1997) 14, 20, 23, 27, 28

Miller v. Florida, 482 U.S. 423 (1987).. 10, 14, 15, 23, 24, 26

Piper v. Perrin, 560 F. Supp. 253 (D.N.H. 1983) 14

In re Ramirez, 39 Cal. 3d 931, 218 Cal. Rptr. 324, 705 P.2d 897 (1985).....14, 17

Rise v. Oregon, 59 F.3d 1556 (9th Cir. 1995)..... 18

Spradling v. Maynard, 527 F. Supp. 398 (W.D. Okla. 1981).....11, 14

United States v. Byrd, 116 F.3d 770 (5th Cir. 1997) 14

United States v. Ellen, 961 F.2d 462 (4th Cir. 1992) 15

Weaver v. Graham, 450 U.S. 24 (1981) ..... *passim*

United States v. Ursery, 518 U.S. 267 (1996) 28

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 10 1

STATUTES

28 U.S.C. § 1257(a) 1

Sup. Ct. R. 12.4 1

Sup. Ct. R. 13.1 1

K.S.A. § 22-3717(a) 1, 5

TABLE OF AUTHORITIES – Continued

Page

K.S.A. § 22-3718 ..... 1, 5

K.S.A. § 22-3725 ..... 2, 5

K.A.R. 44-6-108 ..... 6, 7

K.A.R. 44-6-124 ..... *passim*

K.A.R. 44-6-142 ..... 2, 6

OTHER AUTHORITIES

16A C.J.S. *Constitutional Law* § 409 10

Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Georgetown L. J. 2143 (1996) 28

Thomas K. Landry, *"Punishment" And The Eighth Amendment*, 57 Ohio St. L. J. 1607 (1996) 15

Kan. City Star A3 (Aug. 3, 1998) 22

Kan. City Star A12 (Aug. 9, 1998) 22

OPINIONS BELOW

The June 5, 1998, decisions of the Kansas Supreme Court, holding that certain administrative regulations governing good time credits violate constitutional *ex post facto* principles are reported, 265 Kan. 404, ___ P.2d ___ (1998), and 265 Kan. 341, ___ P.2d ___ (1998), and are included as Appendix A. The unreported July 8, 1998 orders of the Kansas Supreme Court denying the petitioners' request for rehearing are included as Appendix B.

JURISDICTION

This Court's jurisdiction to review the final judgment of the Kansas Supreme Court is invoked pursuant to 28 U.S.C. § 1257(a). The Kansas Supreme Court issued its decisions in these cases on June 5, 1998, and denied the State's timely petitions for rehearing on July 8, 1998. This petition has been filed within ninety days of the latter date as required by Supreme Court Rule 13.1. Because the judgments in these cases involve identical or closely related questions, this single petition for writs of *certiorari* addresses both cases. Sup. Ct. R. 12.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Ex Post Facto* Clause applicable to the States provides that

> "No State shall . . . pass any . . . ex post facto Law. . . . U.S. Const. Art. I, § 10.

Kansas Statute Annotated (K.S.A.) § 22-3717(a) provides in part that an inmate

> shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits.

K.S.A. § 22-3718 provides in part that an inmate's conditional release date is

> the inmate's maximum term or terms, less such work and good behavior credits as have been earned. . . .

K.S.A. § 22-3725(d) provides that

> Good time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections.

One of the two Kansas Administrative Regulations ("K.A.R.") invalidated in these cases, K.A.R. 44-6-142, provides as follows:

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

The prior version of the regulation, effective when the respondents were convicted and sentenced, provided that

> When computing the conditional release date, it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied *on a projected basis*. K.A.R. 44-6-142 (1989) (emphasis added).

The other regulation the Kansas Supreme Court invalidated, K.A.R. 44-6-124(g) (1993), provides in part as follows:

> (g) An inmate's disciplinary record shall affect the earning of good time awards in the following manner.
>
> (1) A guilty finding of a class I disciplinary offense shall result in the withholding of a minimum of 50% of the good time credits available for that program classification review period.
>
> (2) A guilty finding of a class II disciplinary offense shall result in the withholding of a

minimum of 25% but not more than 50% of the good time credits available for that program classification review period.

(3) A guilty finding of a class III disciplinary offense shall result in the withholding of a minimum of 10% but not more than 25% of the good time credits available for that program classification review period.

* * *

(6) A refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail.

The version of K.A.R. 44-6-124 in effect when respondents were convicted and sentenced provided that

(a) For parole eligibility, award of good time credits shall be limited as follows:

(1) Inmates with no class I offenses during the review period shall receive at least 50% of the good time credits allocated for that period.

(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.

(3) Inmates with no class I, II or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.

(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.

(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior, and on other performance factors related to effective rehabilitation of the inmate.

STATEMENT

Procedural History

Respondent Michael A. Bankes has been incarcerated since 1990 under a 4- to 15-year sentence for indecent liberties with a child and additional consecutive sentences for drug offenses. Respondent Raymond F. Stansbury, has been incarcerated since 1991 under a 10- to 20-year sentence for rape. Respondents filed these state post-conviction actions in Kansas district courts, alleging that changes in the Kansas Department of Corrections regulations regarding the awarding of good time credits for purposes of determining an inmate's parole eligibility and conditional release dates violates the constitutional prohibition on *ex post facto* laws. One district court dismissed Bankes' suit while another district court ruled in Stansbury's favor.

On June 5, 1998, in two separate opinions that reference each other, the Kansas Supreme Court reversed the dismissal of Bankes' suit, and affirmed judgment in Stansbury's favor, holding that the regulations at issue are constitutionally prohibited *ex post facto* laws. Appendix A. On July 8, 1998, the Kansas Supreme Court denied the State's timely request for rehearing in both cases. Appendix B. On July 9, 1998, the Kansas Supreme Court denied the State's petition for review of a Kansas Court of Appeals decision raising substantially similar *ex post facto* issues. That case is the subject of a separate petition, *McKune, et al. v. Steltzlen*, No. 98-___, filed simultaneously with this petition.

The Kansas Supreme Court denied the State's request for a recall of the mandate in these cases pending proceedings in this Court. Appendix C. Petitioners are filing simultaneously with this petition an application for a stay of these decisions with Justice Breyer, Circuit Justice for the Tenth Circuit.

Statement of Facts

1. *The Kansas Statutes And Administrative Regulations Concerning Good Time Credits And Parole Eligibility Dates*

In Kansas, the awarding of good time credits is authorized by statute. *See* K.S.A. § 22-3725. Some details of how such credits are earned, awarded, forfeited, withheld and accumulated are included in the statute, but the statute also provides that "[g]ood time credits shall be awarded on an earned basis pursuant to rules and regulations adopted by the secretary of corrections." *Id.* at § (d).

The earning, awarding, forfeiting, withholding and accumulation of good time credits affect two important dates for inmates: (1) an inmate's parole eligibility date; and (2) an inmate's conditional release date. The parole eligibility date is, as its name suggests, the date on which an inmate first becomes eligible to be considered for parole. In Kansas, that date is the "entire minimum sentence imposed by the court, less good time credits." K.S.A. § 22-3717(a). The conditional release date, on the other hand, is the date on which an inmate is entitled to be released from incarceration. Conditional release is "the inmate's maximum term or terms, less such work and good behavior credits as have been earned." K.S.A. § 22-3718; *see generally Beck v. Kansas Adult Authority*, 241 Kan. 13, 29-30, 735 P.2d 222, 234-35 (1987).

These important dates, when the inmate is serving an indeterminate sentence less than life imprisonment, are

calculated by deducting good time credits from the minimum and maximum terms of imprisonment respectively. Thus, the parole eligibility date for an inmate like Stansbury serving a 10- to 20-year sentence is calculated by deducting earned good time credits from 10 years, while the conditional release date is calculated by deducting good time credits from 20 years.

With respect to conditional release dates, the Department of Corrections regulation in effect at the time the respondents in these cases committed their crimes, were convicted and sentenced, provided that "it shall be presumed that 100% of the available good time credits has been earned, and the good time credits shall be applied on a projected basis." K.A.R. 44-6-142 (1989); *see also* K.A.R. 44-6-108(c) (1989). This meant that, solely for purposes of calculating the conditional release date, the instant an inmate entered prison the inmate was presumed to have earned 100% of the available good time credits. So, in the preceding example, if the available good time credit on a 20-year sentence was 10 years, the inmate's conditional release date would be 10 years from the beginning date of the sentence, and that date would be established the day the inmate entered the prison. In 1995, however, the Department of Corrections amended the regulation to conform to the statutory directive that good time credits be "earned," providing that

> When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded *on an earned basis* pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date. K.A.R. 44-6-142 (1995) (emphasis added).

With respect to parole eligibility dates, the department of corrections regulations never presumed that 100% of available good time credits would be earned.

Rather, good time credits counting toward parole eligibility had to be actually earned and were accumulated only as they were earned. *See* K.A.R. 44-6-108(b) (1989). Also, at the time these respondents committed their crimes, were convicted and sentenced, good time credits for parole eligibility were awarded on a minimum percentage basis for each category or categories of prison offenses that inmates avoided committing during the review period. *See* K.A.R. 44-6-124(a) (1989) (quoted in full above). In other words, the regulations were phrased in terms of minimum rewards for good behavior. That changed, however, in 1993, when the regulations were amended to require minimum withholding of good time credits for prison offenses (rather than minimum awards for good conduct), and to provide that refusal to participate in an assigned program, such as the Sexual Abuse Treatment Program, would result in the withholding of 100% of good time credits for the review period. *See* K.A.R. 44-6-124(g)(1)-(6) (1993) (quoted in full above).

Thus, the regulations at issue in these cases made three changes in the good time credit regulations (but not the statutes) in effect when the respondents committed their crimes, were convicted and sentenced: (1) good time credits toward conditional release are no longer presumed earned on a projected basis but, after March 1, 1995, must be actually earned; (2) for both parole eligibility and conditional release, good time credits are determined by minimum withholding for misconduct rather than by minimum rewards for good conduct; and (3) good conduct, for purposes of potentially withholding good time credits, has been further defined to include participation in assigned programs, such as the Sexual Abuse Treatment Program.

What is undisputed and unchanged about good time credits in Kansas is that the relevant statutes have not changed and the total amount of good time credits available to shorten parole eligibility and conditional release

dates is unchanged. Only if the respondents engage in misconduct after the effective dates of the regulatory changes discussed above will their parole eligibility and conditional release dates be any different than they would have been under the regulatory scheme in effect when respondents committed their crimes, were convicted and sentenced.

2. *Raymond F. Stansbury*

Raymond Stansbury was convicted of rape and sentenced to a term of 10 to 20 years in 1991. App. 3a. As noted previously, administrative regulations in place in the Kansas prisons in 1991 did not authorize the withholding of good time credits for refusal to participate in formal programs, such as a treatment program. *Id.* at 3a-4a. Stansbury's unit team in the prison recommended that he participate in the Sexual Abuse Treatment Program (SATP). *Id.* at 4a.

A condition of participation in the SATP is an admission of guilt by the inmate. Stansbury has refused to participate in the SATP because of this requirement. As a result, the prison has withheld 100% of Stansbury's good time credits applicable to his parole eligibility date since April, 1994, following the 1993 amendment to the regulations to provide that a refusal to participate in an assigned program shall result in a 100% withholding of good time credits for that review period. *Id.* The prison also has withheld credit toward Stansbury's conditional release date since the 1995 amendment requiring that such credits be actually earned. *Id.* at 7a-14a.

3. *Michael A. Bankes*

In 1990, Michael Bankes was convicted of indecent liberties with a child and sentenced to 4 to 15 years in prison. App. 28a. Bankes also received consecutive 1- to 5-year and 4- to 15-year sentences for drug offenses. As

discussed above, the administrative regulations in place in the Kansas prisons in 1990 did not authorize the withholding of good time credits for refusal to participate in formal programs, such as a treatment program. *Id.* at 29a. Bankes' sentence did not include any order for him to participate in any kind of sexual offender treatment program, *id.*, but his unit team in the prison recommended that he participate in the Sexual Abuse Treatment Program (SATP). *Id.*

A condition of participation in the SATP is an admission of guilt by the inmate. *Id.* at 28a. Like Stansbury, Bankes has refused to participate in the SATP because of this requirement. *Id.* As a result, the prison has withheld 100% of Bankes' good time credits applicable to his conditional release date since 1995, *id.* at 29a, following the 1993 amendment of K.A.R. 44-6-124 to provide that "[a] refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period," unless the inmate is determined to be physically or mentally unable to participate.

4. *The Kansas Supreme Court's Decisions*

A majority of the Kansas Supreme Court concluded that the amended regulations amounted to *ex post facto* violations when applied to Bankes and Stansbury. The Chief Justice dissented, but without a written opinion.

a. *Stansbury v. Hannigan, et al.*

The Kansas Supreme Court began its *ex post facto* analysis by citing and quoting this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981), for the proposition that, in order for a law to be *ex post facto*, two critical

elements must be present. "The law must be retrospective, applying to events occurring before its enactment, and it must disadvantage the offender affected by it." App. 14a (paraphrasing *Weaver*, 450 U.S. at 29). The court first considered whether the constitutional *ex post facto* prohibition applies to prison regulations, as opposed to legislative enactments, but concluded that, at least in Kansas, it must. The court relied upon the proposition that "[p]olitical subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the Ex Post Facto Clause." App. 14a (citing 16A C.J.S., *Constitutional Law* § 409, p. 355). The court observed that regulations adopted in accordance with the procedures set forth by the Kansas Legislature have the force and effect of law in Kansas. App. 15a. The court pointed out that the Kansas Department of Corrections is a state agency, and opined that the agency, when adopting good time credits regulations, "acts as a political subdivision exercising delegated legislative power." *Id.* For that reason, the court concluded that the prison regulations at issue in these cases "are within the ambit of the Ex Post Facto Clause of the United States Constitution." *Id.*[1]

The court then addressed this Court's decision in *Weaver*, which involved an *ex post facto* challenge to a statutory reduction in the number of good time credits

---

[1] There is an acknowledged split of authority in the Courts of Appeal and state courts over the issue whether prison regulations and parole guidelines are "laws" for *ex post facto* purposes. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari*); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the continuing split of authority); *see also Miller v. Florida*, 482 U.S. 423, 434 (1987) (observing that numerous lower federal courts have refused to apply the *Ex Post Facto* Clause to revisions in the *federal* parole guidelines).

available for award to Florida inmates for good behavior. The court pointed out that this Court in *Weaver* rejected the argument that the statutory reduction in the amount of available good time credits was offset – for *ex post facto* purposes – by new opportunities to earn equal or even greater good time at prison officials' discretion. App. 16a-17a. Instead, this Court reasoned that Florida inmates were disadvantaged by the change because, even if they obeyed all prison regulations and completed all work assignments, the credits they received would be reduced and they could only make up the difference by satisfying extra conditions that previously had not existed. 450 U.S. at 35. The Kansas Supreme Court also examined a district court decision in *Spradling v. Maynard*, 527 F. Supp. 398 (W.D. Okla. 1981), which found an *ex post facto* violation when Oklahoma altered its good time credit system to require that such credits be earned, rather than automatically awarded.

The court opined that Stansbury's "position is similar to those in *Weaver* and *Spradling*." App. 18a. The court concluded that the 100% withholding of good time credits toward parole eligibility for Stansbury's refusal to participate in the SATP was both retrospective and disadvantaged Stansbury. *Id.* The court then reached the same conclusion with respect to the change in calculating an inmate's conditional release date by requiring that good time credits be actually earned. "Again, the regulation as applied to the petitioner was retrospective in that it applied to events occurring before its enactment, and it disadvantaged the offender affected by it." App. 19a.

Lastly, the Kansas Supreme Court considered whether this Court's decision in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), affected the preceding conclusions. In *Morales*, this Court rejected an *ex post facto* challenge to a statutory amendment that lengthened the time between parole hearings in California for certain categories of inmates. The Kansas Supreme Court opined

that *Morales* "does refine the focus of the *ex post facto* analysis," App. 20a, by inquiring not whether the change "disadvantages" an inmate but, rather, whether the change alters the definition of criminal conduct or increases the penalty for the crime. Nonetheless, the court asserted that *Morales* does not affect the outcome in this case. First, the court opined that the change in calculating the conditional release date necessarily increases the punishment for an inmate's crime and is thus an *ex post facto* law even under *Morales*. App. 20a. Second, although the court acknowledged that the parole eligibility question "is much closer," *id.*, it still concluded that the amended regulation was an *ex post facto* law. The court reasoned that

> the amendment we deal with in this case goes beyond merely allowing the petitioner an opportunity to take advantage of provisions for an earlier release date. The amended regulation actually forces the petitioner to engage in the required program or risk the loss of good time credits which would automatically be earned under the old system. As a result, it has a very direct effect on the petitioner's parole eligibility and also constitutes an *ex post facto* application of law. App. 21a.

Chief Justice McFarland dissented without opinion. App. 26a.

b. *Bankes v. Simmons, et al.*

Relying on its decision in *Stansbury v. Hannigan*, the Kansas Supreme Court agreed with Bankes' claim that application of the revised parole eligibility and conditional release regulations to him violated *ex post facto* principles. The court pointed out that its *Stansbury* decision addressed and decided the same issue, but added that

> trial judges are aware of conditional release dates and how they are computed. When the defendant was sentenced, most trial judges would have considered the maximum time the defendant would have to serve in setting the sentence. App. 45a.

Thus, the court concluded that, "[f]or the reasons set forth in *Stansbury*, the application of K.A.R. 44-6-124 by KDOC to Bankes, due to his refusal to participate in the SATP, violates the ban on *ex post facto* laws. . . . " App. 45a. Chief Justice McFarland again dissented from the court's *ex post facto* holding. App. 46a ("I dissent from the majority opinion's determination that K.A.R. 44-6-124 constitutes an *ex post facto* law in reliance upon *Stansbury v. Hannigan*").

REASONS FOR GRANTING THE WRIT

I. The Kansas Supreme Court's Decisions Are Contrary To Decisions Of Federal Courts Of Appeal And Other State Courts Of Last Resort

A. The Lower State And Federal Courts Have Divided Over What Regulations Affecting Inmates Are "Laws" For *Ex Post Facto* Purposes And What Changes Affecting Good Time Credits Violate Constitutional *Ex Post Facto* Principles

1. The Kansas statutes and prison regulations at issue in these cases are not unique. Indeed, *ex post facto* challenges to changes in good time statutes and regulations have been relatively common since this Court's potentially sweeping decision in *Weaver v. Graham*, 450 U.S. 24 (1981). In *Weaver*, this Court invalidated a Florida good time credit statute that reduced the amount of credits available for good behavior, *i.e.*, an inmate behaving in the same fashion received more good time credits before the statute was changed. This Court itself has

decided several other *ex post facto* cases since *Weaver*, arguably narrowing the application of *Weaver* in perhaps all of those cases. *See Miller v. Florida*, 482 U.S. 423 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990); *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995); and *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997)

Several post-*Weaver* lower court decisions have rejected *ex post facto* challenges to statutory and regulatory changes in the awarding of good time credits, often in reliance upon later decisions such as *Collins* and *Morales*. *See, e.g., Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), *cert. denied*, 511 U.S. 1111 (1994); *In re Ramirez*, 39 Cal. 3d 931, 218 Cal. Rptr. 324, 705 P.2d 897 (1985), *cert. denied*, 476 U.S. 1152 (1986); *Chauvin v. Erickson*, 998 F.2d 617 (8th Cir. 1993); *cf. Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996) (change in work release program does not violate *ex post facto* prohibition); *United States v. Byrd*, 116 F.3d 770 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 354, 612 (1997) (change in sentencing guidelines after defendant committed crime but before defendant violated probation does not violate *ex post facto* prohibition).

Other decisions have invalidated such changes on *ex post facto* grounds, almost always relying quite heavily on *Weaver*, as did the Kansas Supreme Court in these cases. In addition to the Kansas decisions at issue here and in the related petition, *McKune, et al. v. Steltzlen*, No. 98-___, see, for example, *Knuck v. Wainwright*, 759 F.2d 856 (11th Cir. 1985); *Beebe v. Phelps*, 650 F.2d 774 (5th Cir. 1981); *Arnold v. Cody*, 951 F.2d 280 (10th Cir. 1991); *Spradling v. Maynard*, 527 F. Supp. 398 (W.D. Okla. 1981); *Piper v. Perrin*, 560 F. Supp. 253 (D.N.H. 1983); *cf. Knox v. Lanham*, 895 F. Supp. 750 (D. Md. 1995) (changes in work release requirements are *ex post facto* violation), *aff'd*, 76 F.3d 377 (4th Cir. 1996).

2. A preliminary issue that the Kansas Supreme Court addressed in these cases and on which there is an acknowledged split of authority is whether *ex post facto*

prohibitions even apply to prison or parole regulations, as opposed to legislative enactments. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari* with respect to that issue); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the split); *Ewell v. Murray*, 11 F.3d 482, 487 n. 2 (4th Cir. 1993) (noting the split); *see also Miller v. Florida*, 482 U.S. 423, 434 (1987) (observing that numerous lower federal courts have refused to apply the *Ex Post Facto* Clause to revisions in the federal parole guidelines); Thomas K. Landry, *"Punishment" And The Eighth Amendment*, 57 Ohio St. L. J. 1607, 1658-59 (1996) (noting the uncertainty and concluding that the possibility of the Court limiting the *Ex Post Facto* Clause's application to statutory amendments "cannot be ignored, especially in light of the Court's recent constriction of ex post facto doctrine").

All of this Court's *ex post facto* decisions cited above involved amendments to state statutes, not changes in prison or parole regulations, and there are clear statements in this Court's cases that the *Ex Post Facto* Clause "has been interpreted to pertain exclusively to *penal statutes*." *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997) (emphasis added) (citing *California Dept. of Corrections v. Morales*, 514 U.S. 499, 505 (1995)); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990) ("Although the Latin phrase '*ex post facto*' literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes. . . . "). Thus, contrary to the Kansas Supreme Court, some courts have concluded that prison and parole regulations are not "Laws" for *ex post facto* purposes. *See, e.g., Bailey v. Gardebring*, 940 F.2d 1150, 1155-57 (8th Cir. 1991), *cert. denied, Bailey v. Noot*, 503 U.S. 952 (1992); *Francis v. Fox*, 838 F.2d 1147, 1150 (11th Cir. 1988); *United States v. Ellen*, 961 F.2d 462, 465 (4th Cir.), *cert. denied*, 506 U.S. 875 (1992).

This issue alone merits this Court's review, and these Kansas cases provide an appropriate vehicle for resolving the question. The Kansas Supreme Court addressed and decided this federal question on the merits, and resolution of the issue could be determinative of the outcome in both of these cases.

3. On the merits of the *ex post facto* question, the decisions invalidating changes in the awarding of good time credits, like the Kansas Supreme Court's decisions in these cases, rely heavily on this Court's decision in *Weaver v. Graham*, 450 U.S. 24 (1981). In particular, the cases rely upon this Court's statement that the two critical elements of an *ex post facto* claim are that the law "must be *retrospective*, that is, it must apply to events occurring before its enactment, and it must *disadvantage* the offender affected by it." 450 U.S. at 29 (emphasis added). Continuing reliance upon *Weaver*, however, is problematic for several reasons.

One problem is that the concepts of retrospectivity, and especially "disadvantage," have almost unlimited potential breadth. This Court recognized in *California Dept. of Corrections v. Morales*, that some of the Court's prior *ex post facto* decisions emphasize the "disadvantage" concept, but then concluded that such

> language was unnecessary to the results in those cases and is inconsistent with the framework developed in *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). After *Collins*, the focus of the *ex post facto* inquiry is not on whether a legislative change produces some ambiguous sort of "disadvantage," . . . but on whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. 514 U.S. at 506 n. 3.

Contrary to the Kansas Supreme Court in these cases, a number of federal Courts of Appeal and at least one state supreme court have rejected *ex post facto* challenges

in essentially identical circumstances. Generally, they have been critical of *Weaver* or have largely disregarded it in so doing. For example, in *In re Ramirez*, 705 P.2d 897 (Cal. 1985), the California Supreme Court rejected *ex post facto* challenges to statutory changes in the awarding, withholding and forfeiture of good time credits that, in most respects, are indistinguishable from the changes at issue in these Kansas cases. In particular, the changes in California law altered the types of infractions that could give rise to loss of good time credits, increased the punishment for disciplinary offenses, punished misbehavior during an assigned activity by withholding both good behavior and participation credits, and eliminated prior limits on the amount of credits subject to forfeiture during a given time period. 705 P.2d at 899.

The California Supreme Court examined *Weaver* in detail, criticizing the case's emphasis on the "disadvantage" concept, 705 P.2d at 900 ("If we were unencumbered we would be tempted to find that any disadvantage stems from petitioner's own action and the 1982 amendments are not disadvantageous on their face"), but nonetheless upholding the California statutory changes on the ground that they were not "retrospective" under *Weaver*. Rather, the court concluded that "the increased sanctions are imposed solely because of petitioner's prison misconduct occurring after the 1982 amendments became effective." 705 P.2d at 901. In a statement that describes these Kansas cases perfectly, the California Supreme Court observed that

> There is a critical difference between a diminution of the ordinary rewards for satisfactory performance of a prison sentence – the issue in *Weaver* – and an increase in sanctions for *future misbehavior* in prison – which is at issue here. Here, petitioner's opportunity to earn good behavior and participation credits is unchanged.

> All that has changed are the sanctions for prison misconduct. 705 P.2d at 901.

The court also emphasized the importance of the *ex post facto* issue in prison administration, correctly pointing out that

> From the standpoint of prison order, it is simply infeasible to run a prison in which some inmates are wholly or partially immune from punishment for conduct for which others receive serious penalties. *Id.*

Lastly, the California Supreme Court observed that the rules affecting prison misconduct are "too contingent and remote" to have a significant influence on defendants and trial courts at the time of sentencing and that, in any event, the inmate in this case "had fair warning" of the new sanctions. *Id.* at 902. The Eighth Circuit has reached the same result. *See Chauvin v. Erickson*, 998 F.2d 617 (8th Cir. 1993) (finding that a new statute requiring inmates to perform work assignments in order to earn good time credits rather than automatically receiving credits for good behavior did not violate the *Ex Post Facto* Clause).

At least two Court of Appeals decisions have rejected *ex post facto* challenges to changes in good time credits and work release opportunities that in particular affected sex offenders, like the respondents in these Kansas cases. In *Ewell v. Murray*, 11 F.3d 482 (4th Cir. 1993), the Fourth Circuit upheld a change in prison regulations that made incarcerated sex offenders' failure to provide blood samples for a DNA data bank a new prison infraction that would result in the loss of good time credits.[2] The inmates in *Ewell* argued that the change was retrospective

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[2] *See also Jones v. Murray*, 962 F.2d 302 (4th Cir. 1992) (rejecting constitutional challenges to the DNA sampling itself); *Gilbert v. Peters*, 55 F.3d 237 (7th Cir. 1995) (same); *Rise v. Oregon*, 59 F.3d 1556, 1562 (9th Cir. 1995), *cert. denied*, 517 U.S. 1160 (1996) (same).

and disadvantaged them within the meaning of *Weaver*, but the Fourth Circuit relied instead on this Court's later decision in *Collins v. Youngblood*, 497 U.S. 37 (1990), which purported to narrow the concept of "disadvantage" to changes altering the definition of criminal conduct or increasing the punishment for the crime. 11 F.3d at 485.

The Fourth Circuit proceeded to reject the *ex post facto* claim for a number of reasons. First, the court observed that

> Reasonable prison regulations are not frozen at the time of each inmate's conduct, but rather, they may be subject to reasonable amendments as necessary for good prison administration, safety and efficiency, without implicating *ex post facto* concerns. 11 F.3d at 485-86.

Next, the court pointed out the DNA data bank statute was not penal in nature and that the total amount of good time credits available for good conduct had not changed. *Id.* at 486. The court correctly declared that an inmate "has no right to a particular set of prison regulations adopted to maintain the order, safety, and efficiency of the prison." *Id.* Thus, in the court's view, the regulations only increased the punishment for future misconduct constituting a violation of prison regulations; they did not constitute additional punishment for the original crime. *Id.* at 487. The court concluded that

> In summary, the good conduct credit system in this case has remained constant, unlike the circumstances in *Weaver*, and prison punishment was adopted to apply to existing inmates prospectively for infractions of reasonable prison regulations. *Id.*

Similarly, in *Dominique v. Weld*, 73 F.3d 1156 (1st Cir. 1996), the inmate was a convicted sex offender who might have qualified for a work release program under regulations in effect when he was convicted and sentenced.

Later, however, the regulations were amended to prohibit sex offenders from participating in work release programs unless they successfully completed a treatment program and admitted their sex offenses. *Id.* at 1161. The First Circuit rejected the inmate's *ex post facto* challenge to the new regulation.

First, the court pointed out the split of authority in the Circuits on the question whether prison regulations are "laws" for *ex post facto* purposes. *Id.* at 1162 & n. 10. The court did not, however, attempt to resolve the issue because it rejected the *ex post facto* claim on the merits. Largely ignoring *Weaver v. Graham* and instead relying on this Court's decision in *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995), the First Circuit declared that the test is whether the change in regulations increased the penalty for the inmate's crime. 73 F.3d at 1162, 1163. Recognizing that the amended regulation subjected the inmate to a different and stricter regime than when he committed his crime, the court nonetheless found no *ex post facto* violation because the change did not affect the length of the inmate's sentence or his parole options. *Id.* at 1163. The First Circuit concluded by emphasizing that

> The Ex Post Facto Clause does not encourage close scrutiny by the federal courts of ongoing procedural or operational changes in prisons to coordinate treatment, promote security, and protect the public safety. *Id.*

Thus, unlike the lower court decisions that have followed this Court's more recent *ex post facto* decisions such as *Collins* and *Morales*, the Kansas Supreme Court adhered to the sweeping approach this Court first suggested in *Weaver*. As indicated above, the Kansas Supreme Court is not alone in continuing to rely on *Weaver*. This Court itself did so in part in its most recent *ex post facto* decision involving good time credits, *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997). With all due respect, petitioners request that this Court grant review

in this case to clarify whether, and if so how, *ex post facto* principles apply to prison *regulations* affecting good time credits.

B. The Kansas Supreme Court's Decisions Address Important, Unresolved *Ex Post Facto* Questions On Which Prison Authorities And The Lower Federal And State Courts Require Guidance

As the preceding discussion demonstrates, these Kansas cases and the *ex post facto* issues they raise are by no means rare or unique.[3] Under existing constitutional jurisprudence, every change in prison regulations governing the conduct of inmates is a potential *ex post facto* problem. Moreover, it is beyond dispute that the States and the federal government have compelling interests both in maintaining order and discipline in their prisons and in protecting society from dangerous, incarcerated offenders who may some day be released. Currently, however, it is unclear to what extent prison officials may address these problems other than on a purely prospective basis.

As explained above, several decisions – including these Kansas cases – have invalidated changes in statutes or regulations affecting good time credits, while several other decisions have rejected the very same challenges. The reasoning behind the decisions rejecting and upholding such challenges cannot be reconciled. Given the importance of the inmates' interests and the serious prison administration and safety concerns present in these cases, it is appropriate for this Court to intervene

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[3] As Justice White noted, *ex post facto* issues regarding amended parole or prison regulations, are "likely to arise frequently." *Bailey v. Noot*, 503 U.S. 952, 953 (1992) (dissenting from the denial of *certiorari*).

and provide additional guidance to the lower courts and prison officials at this time.

The *ex post facto* issues that arise in these Kansas cases are a source of controversy across the country, and the answers to the questions are of extreme importance to the administration of today's large prison populations. A report recently released by the United States Department of Justice indicates that our nation's adult prison population has risen to an all-time high of more than 1.7 million inmates, with much of the increase fueled by inmates serving longer terms for violent crimes. *See, e.g.*, Fox Butterfield, *Prison population posts gain for '97*, Kan. City Star A12 (Aug. 9, 1998); Associated Press, *Longer incarcerations produce growth in U.S. prison population*, Kan. City Star A3 (Aug. 3, 1998).

Prison officials often need the flexibility to amend and refine the rules and regulations that govern inmates' conduct. But if every change or amendment is an *ex post facto* violation when applied to inmates already in the prison, then prison officials' hands will be tied. Moreover, *ex post facto* issues with respect to good time credits tend to be most significant for the inmates serving the longest prison terms. Often these inmates are the most serious and violent offenders in the prison systems. Given the extreme public importance of the questions presented, the compelling interests at stake on both sides of these issues, and the sharp split of authority in the federal Courts of Appeal and the state courts on these issues, these cases warrant this Court's plenary review.

II. The Kansas Supreme Court's Decisions Are Contrary To This Court's *Ex Post Facto* Decisions

The decisions addressing the constitutionality of changes in prison regulations and good time credit statutes have turned upon the lower courts' understanding of this Court's *ex post facto* decisions, in particular *Weaver*

v. Graham, 450 U.S. 24 (1981), and to a lesser extent *Dobbert v. Florida*, 432 U.S. 282 (1977); *Miller v. Florida*, 482 U.S. 423 (1987); *Collins v. Youngblood*, 497 U.S. 37 (1990); *California Dept. of Corrections v. Morales*, 514 U.S. 499 (1995); and *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997).

None of the cases question the proposition that inmates have constitutional protection from retroactive increases in their punishment, and the State of Kansas does not question that fundamental constitutional principle. This Court's decisions, however, do not support the result the Kansas Supreme Court reached in these cases.

1. First, and most importantly, the Kansas Supreme Court erred in concluding that prison regulations are subject to *ex post facto* restrictions, at least in these cases. Although the Kansas Department of Corrections promulgated the regulations pursuant to statutory authority, the controlling Kansas statutes are clear that good time credits shall be "earned." The Department of Corrections lacked the power to provide otherwise, which simply proves the point that the *Ex Post Facto* Clause should be limited, as this Court's cases repeatedly have recognized, to the application of *penal statutes*. This issue, however, has divided the lower courts. *See Bailey v. Noot*, 503 U.S. 952 (1992) (White, J., dissenting from the denial of *certiorari* with respect to that issue); *Dominique v. Weld*, 73 F.3d 1156, 1162 & n. 10 (1st Cir. 1996) (noting the split); *Ewell v. Murray*, 11 F.3d 482, 487 n. 2 (4th Cir. 1993) (noting the split); Landry, 57 Ohio St. L. J. at 1658-59.

For the past sixty years, this Court's *ex post facto* decisions have all involved amendments to *statutes*, not prison regulations. Thus, the *ex post facto* challenges in *Lindsey v. Washington*, 301 U.S. 397 (1937); *Weaver*, 450 U.S. at 25; *Miller v. Florida*, 482 U.S. at 434-35; *Morales*, 514 U.S. at 503; and *Lynce*, 117 S. Ct. at 893, all involved amendments to state penal statutes. Similarly, this Court has expressly declared in recent years that the *ex post facto*

prohibition "has been interpreted to pertain exclusively to penal statutes." *Kansas v. Hendricks*, 117 S. Ct. 2072, 2086 (1997); *see also Collins v. Youngblood*, 497 U.S. 37, 41 (1990). ("Although the Latin phrase *'ex post facto'* literally encompasses any law passed 'after the fact,' it has long been recognized by this Court that the constitutional prohibition on *ex post facto* laws applies only to penal statutes. . . . ").

This Court also has observed that, prior to the sentencing guidelines era, the lower federal courts generally upheld revisions in the federal parole guidelines against *ex post facto* challenges. *See Miller v. Florida*, 482 U.S. 423, 434 (1987). The Court pointed out that the lower courts reached that conclusion for three reasons: (1) federal parole guidelines are not "laws" for *ex post facto* purposes; (2) the parole guidelines merely "rationalize the exercise of statutory discretion"; and (3) retrospective application of the parole guidelines does not result in a more onerous punishment. 482 U.S. at 434-35. With all due respect, all three of those rationales, which were widely endorsed and followed by the lower federal courts, apply to the Kansas regulations at issue in these cases.

The conditional release and parole eligibility statutes in Kansas have not changed since respondents committed their sexual crimes, nor have respondents' sentences changed, and they make no such claims. Moreover, not even the total amount of good time credits available to respondents has changed. Rather, respondents are complaining about changes in administrative regulations designed to implement statutory directives and to maintain prison discipline and safety. With respect to conditional release dates, those regulations originally adopted an approach contrary to the plain statutory language and to the unwarranted benefit of inmates such as respondents. With respect to parole eligibility dates, the regulations have simply further refined what constitutes good

behavior and the sanctions for misconduct. But there has been no change in the Kansas penal statutes that "alters the definition of criminal conduct or increases the penalty by which a crime is punishable." *California Dept. of Corrections v. Morales*, 514 U.S. 506 n. 3 (1995); *see also Dobbert v. Florida*, 432 U.S. 282, 293-94 (1977) (*ex post facto* question is whether the statutory amendment changes "the quantum of punishment").

2. Second, this Court's decision in *Weaver*, on which the Kansas Supreme Court relied almost exclusively, is distinguishable. *Weaver* involved a statute that reduced the amount of good time credits available even if the inmate complied with good behavior requirements. *See* 450 U.S. at 26. In *Weaver*, after the statutory amendment, the inmates would have received significantly less good time credit for the very same good behavior. *See id.* at 33 ("On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks.").

That is not true in these Kansas cases. The amended Kansas regulations do not take away the opportunity for the same total good time credits as existed before the changes. Rather, they simply require the earning of good time credits toward conditional release, as the controlling statute requires, and they further refine the definition of good behavior and the consequences of bad behavior with respect to parole eligibility. The Kansas regulations do not reduce the "gain time available solely for good conduct." *Id.* at 35.

Moreover, three Justices in *Weaver* concurred in the judgment but expressed reservations about constitutionalizing the States' good time credits systems. Justice Blackmun wrote that, "[w]ere the Court writing on a clean slate," he would reject the *ex post facto* claim, analyzing it as follows:

> (a) the 1978 Florida statute does not affect petitioner's credits earned and accumulated prior to the effective date of the statute; (b) "good time" or "gain time" is something to be earned and is not part of, or inherent in, the sentence imposed; (c) all the new statute did was to remove some of petitioner's hope and a portion of his opportunity; and (d) his sentence therefore was not enhanced by the statute. 450 U.S. at 36-37.

Chief Justice (then Justice) Rehnquist also concurred, declaring the case to be "a close one," and asserting that states should retain flexibility in revising good time credit systems, especially if reductions in good time credits for good conduct are offset by increases in the availability of credits that could be earned for more than good conduct. *Id.* at 37-38.

Other decisions of this Court invalidating statutory amendments on *ex post facto* grounds have clearly involved detrimental changes in the penal statute itself, and without regard to any future behavior of the inmate. *See, e.g., Lindsey v. Washington,* 301 U.S. 397 (1937) (invalidating retroactive application of sentencing statute that required mandatory 15-year sentence rather than permitting sentence up to 15 years); *Miller v. Florida,* 482 U.S. 423 (1987) (finding *ex post facto* violation when state applied new sentencing guidelines identifying presumptive sentence of 5½ to 7 years to defendant, rather than 3½ to 4½ presumptive sentence applicable at the time of the offense). On the other hand, the Court has rejected an *ex post facto* challenge when the statutory amendment affects only the *opportunity* to obtain early release, but not the actual sentence itself. *California Dept. of Corrections v. Morales,* 514 U.S. 499 (1995) (no *ex post facto* violation when legislature amended parole provisions to increase the time between parole hearings for certain categories of inmates).

3. This Court's most recent *ex post facto* decision in the prison context also raises serious concerns about the Kansas Supreme Court's decisions in these cases. In *Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891 (1997), this Court found an *ex post facto* violation when Florida amended a statute, with respect to certain categories of inmates such as attempted murderers like Lynce, to retroactively cancel credits previously awarded and used based on overcrowding of the prison system. 117 S. Ct. at 893. Because of the credits he accumulated under the prior version of the statute, Lynce had been released from incarceration. After the statute was amended to cancel the overcrowding credits, state authorities reincarcerated Lynce. Thus, this Court phrased the question as whether the application of the amendment cancelling the credits "after they had been awarded – indeed, after they had resulted in the prisoners' release from custody – violates the *Ex Post Facto* Clause of the Federal Constitution." *Id.* Not surprisingly, the Court found an *ex post facto* violation.

But both the Court's careful phrasing of the question and the concurring opinion by Justice Thomas emphasize the narrow and specific nature of the holding in *Lynce*. Justice Thomas concurred, joined by Justice Scalia, to drive home the relatively unique circumstances of the case:

> Under these narrow circumstances, I agree with the Court that the State's retroactive nullification of petitioner's previously accrued, and then used, release credits violates the Constitution's ban on *ex post facto* lawmaking. I do not, however, join the majority's discussion of *Weaver v. Graham*, which I find unnecessary to the resolution of this case. In *Weaver*, we considered whether a statute that merely altered the availability of "good conduct" credits ran afoul of the *Ex Post Facto* Clause. The present case involves not merely an effect on the availability

> of *future* release credits, but the retroactive elimination of credits already earned and used. 117 S. Ct. at 900 (internal citations omitted).

4. Lastly, the Kansas Supreme Court's opinion relies almost exclusively on this Court's decision in *Weaver*. Thus, even assuming that prison regulations implicate the *Ex Post Facto* Clause, the Kansas Supreme Court's decision hinges upon the proposition that the primary question is whether the *effect* of the amended regulations is to *disadvantage* inmates. But this Court's recent decisions addressing whether particular provisions amount to "punishment" for constitutional purposes take a very different view.

Indeed, in the sexual predator context and in double jeopardy challenges to civil forfeiture and civil sanctions, this Court does not even begin with an "effects" analysis, but instead first considers legislative purpose. *See, e.g., Hudson v. United States*, 522 U.S. ___, 118 S. Ct. 488, 493-95 (1997) (first question is whether enactment is non-punitive on its face or has non-punitive purpose); *Kansas v. Hendricks*, 521 U.S. ___, 117 S. Ct. 2072 (1997) (same); *United States v. Ursery*, 518 U.S. 267 (1996) (same); *cf. Lynce v. Mathis*, 519 U.S. ___, 117 S. Ct. 891, 897 (1997) (discussing to what extent legislative purpose may be relevant to the *ex post facto* analysis). Moreover, this Court has held that "whether a sanction constitutes punishment is not determined from the defendant's perspective." *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 777 n. 14 (1995). *See also* Harold J. Krent, *The Puzzling Boundary Between Criminal And Civil Retroactive Lawmaking*, 84 Geo. L. J. 2143 (1996). The Kansas Supreme Court's approach, however – based on this Court's decision in *Weaver* – does not provide any limit to the reach of the *Ex Post Facto* Clause in the prison context, since many changes in prison regulations arguably have a disadvantageous "effect" on inmates, at least from the inmates' perspective.

In these Kansas cases, the purposes behind the regulatory changes are not punitive. The conditional release date regulation was amended to conform to the controlling statutory directive that good time credits be earned. The parole eligibility regulations were amended to increase the incentives for inmates to participate in important programs available in prison, such as sexual abuse treatment programs. Overall, these regulatory changes are designed to improve prison safety, discipline and order, and to better protect the public when these inmates are released, not to impose additional criminal punishment on inmates.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that this Court grant this petition for writs of *certiorari* and set these cases for plenary review, in order to resolve the splits of authority in the lower federal and state courts.

Respectfully submitted,

TIMOTHY G. MADDEN
Chief Legal Counsel
Kansas Dept. of Corrections
900 Jackson St., Suite 400
Topeka, Kansas 66612
(785) 296-4508

CARLA J. STOVALL
Attorney General

STEPHEN R. MCALLISTER
Special Asst. Attorney General
(Counsel of Record)

301 S.W. 10th Avenue
Topeka, Kansas 66612-1597
(785) 296-2215

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APPENDIX INDEX

Page

APPENDIX A

Stansbury v. Hannigan 1a

Bankes v. Simmons 27a

APPENDIX B

The Kansas Supreme Court Orders Denying Rehearing 47a

APPENDIX C

The Kansas Supreme Court Orders Denying Recall Of The Mandates 49a

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 79,384

RAYMOND F. STANSBURY,
Appellee/Cross-Appellant,

V.

ROBERT D. HANNIGAN, *et al.*,
Appellants/Cross-Appellees.

SYLLABUS BY THE COURT

1.

The United States Constitution's ex post facto prohibition forbids legislative enactment of any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed.

2.

Two critical elements must be present for a criminal or penal law to be ex post facto. It must be retrospective, that is, it must apply to events occurring before its enactment, and it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable.

3.

Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was committed. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the clause if it is both retrospective and more onerous than the law in effect on the date of the offense.

4.

Kansas Administrative Regulations, when adopted, have the force and effect of statute. The Kansas Department of Corrections, in adopting regulations governing inmate conduct in the penal institutions of this state, acts as a quasi-legislative instrumentality exercising delegated legislative power. Thus, the regulations adopted are within the ambit of the Ex Post Facto Clause of the United States Constitution.

5.

When an inmate is afforded the opportunity to possess personal property, he or she enjoys a protected interest in the ownership of that property that cannot be infringed without due process. However, the inmate has no protected right to possession of the property while in prison.

6

While states may under certain circumstances create liberty interests on behalf of inmates, these interests will be generally limited to freedom from restraint which imposes an atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life.

7.

The record is examined in this case involving good time credits for prisoners, and it is held: (1) The 1993 amendment to K.A.R. 44-6-124 constitutes an ex post facto application of law to the petitioner and those similarly situated; and (2) the incentive level system established by Internal Management Policies and Procedures 11-101 does not violate due process.

Appeal from Leavenworth district court, MARTIN ASHER, judge. Opinion filed June 5, 1998. Affirmed.

Jeff Cowger, special assistant attorney general, and *Carla J. Stovall*, attorney general, were on the briefs for appellants/cross-appellees.

Raymond F. Stansbury, appellee/cross-appellant, was on the briefs pro se.

The opinion of the court was delivered by

DAVIS, J.: This appeal by the Department of Corrections and cross-appeal by the petitioner inmate involve two questions. The first question is whether the withholding of good time credits from the petitioner under regulations amended after the petitioner's crime was committed violated the Ex Post Facto Clause of the United States Constitution. The second question is whether internal management policies adopted after the petitioner's sentence, resulting in his loss of privileges, violates the petitioner's due process rights under the United States Constitution. Both matters are questions of first impression before this court. We transferred this case from the Court of Appeals. Our jurisdiction is based upon K.S.A. 20-3017 and K.S.A. 60-2101(b).

The petitioner was tried by jury and convicted on May 10, 1991, of the charge of rape, which arose out of circumstances occurring on September 9, 1990. He was sentenced to the Secretary of Corrections for a term of 10 to 20 years. He began serving his indeterminate sentence on May 18, 1991.

Prior to April 1994, the petitioner earned 100% of his authorized good time credits by remaining free of any

prison offenses and by the discretionary grant of good time credits by the unit team manager. See K.A.R. 44-6-124 (1989). After April 1994, based upon the 1993 amendment to K.A.R. 44-6-124, 100% of the petitioner's potential good time credits (120 days) were withheld for his failure to sign an amended Sex Abuse Treatment Program (SATP) agreement. In August 1994, another 120 days of good time credits were withheld. Sixty days of good time credits were withheld in April 1995, and 120 days more were withheld in October 1995. In January 1996, 120 days of good time credits were again withheld.

Before the adoption of Internal Management Policies and Procedures (IMPP) 11-101 in 1996, the petitioner was entitled and had certain privileges during his incarceration, including but not limited, to the following: ownership and possession of a personal television and handicrafts, use of outside funds, canteen expenditures up to $140 a month, approved visitors, and incentive pay. After the adoption of IMPP 11-101, inmates were required to earn these privileges by generally remaining free of offenses and demonstrating a willingness to participate in recommended programs including, in the petitioner's case, the SATP. Based upon the petitioner's refusal to participate in SATP, he was placed at RAPP 11-101 Level I. At this level he was no longer allowed a personal television but did have access to general television, canteen expenditures were limited to $20 per month, incentive pay was reduced, and visitors were limited to immediate family.

After exhausting his administrative remedies, the petitioner filed a petition for writ of habeas corpus. He contended that the application of the 1993 amendment to

K.A.R. 44-6-124 to him constituted an ex post facto violation and violated due process and that the withholding of good time credits based on his failure to comply with the SATP violated his Fifth Amendment rights. He also contended that the change in his prison conditions and loss of privileges as the result of his classification under IMPP 11-101, constituted a violation of the Ex Post Facto Clause of the United States Constitution.

The trial court narrowed the issues in pretrial conference to the following: the alleged Fifth Amendment violation, the ex post facto nature of the 1993 amendment to K.A.R. 44-6-124, the ex post facto nature of the application of the IMPP 11-101 system, and a claim that the actions of the respondents violated the Eighth Amendment.

The trial court held that the 1993 amendment to K.A.R. 44-6-124(g)(6), as applied to the petitioner who was sentenced in 1991, was an ex post facto law and void under the United States Constitution. The trial court denied any further relief. The Department of Corrections with other named respondents appeal, and the petitioner cross-appeals. For the reasons set forth below, we affirm the trial court.

There are two aspects of this appeal. The first aspect involves good time credits under state statutes and the Kansas Administrative Regulations. The Department of Corrections appeals the trial court's determination that the 1993 amendment to K.A.R. 44-6-124(g)(6), as applied to the petitioner, is an ex post facto law. The petitioner cross-appeals, contending that the 1993 amendment violated his due process rights and that the trial court erred

in determining that the withholding of good time credits for the petitioner's failure to participate in the SATP did not violate his rights under the Fifth Amendment to the United States Constitution.

The second aspect of this appeal involves IMPP 11-101, adopted by the Department of Corrections in 1996 and applied to the petitioner, who was convicted and sentenced in 1991. The petitioner contended before the trial court that such application was ex post facto, although he has abandoned this claim on appeal. For the first time on appeal, he contends that application of the IMPP violates his due process rights. We consider this an important constitutional issue and elect to treat his contention even though he failed to address the matter before the trial court. See *State v. Bell*, 258 Kan. 123, 126, 899 P.2d 1000 (1995).

Good Time Credits

In Kansas, the award of good time credits is authorized by law. See K.S.A. 21-4722; K.S.A. 22-3725. The manner in which such credits are earned, awarded, forfeited, withheld, and accumulated by individual inmates is governed by duly authorized regulations adopted by the Department of Corrections. Good time credits serve a useful purpose within our penal system by providing incentives for good behavior and inmate participation in remedial and rehabilitation programs, as well as sanctions for lack of performance and disobedience.

Two important dates are affected by the awarding, forfeiting, and withholding of good time credits. The first date is the date on which an inmate becomes eligible to

be considered for parole. See K.S.A. 22-3717. The second date is the conditional release date which is the date upon which an inmate is entitled to be released from incarceration. See K.S.A. 22-3718; *Beck v. Kansas Adult Authority*, 241 Kan. 13, 29-30, 735 P.2d 222 (1987).

Parole Eligibility

K.A.R. 44-6-124 (1989), in effect when the petitioner was convicted, provided in pertinent part:

> "For parole eligibility, award of good time credits shall be limited as follows:
>
> "(1) Inmates with no class I offenses during the review period shall receive at least 50% of good time credits allocated for that period.
>
> "(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.
>
> "(3) Inmates with no class I, II or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.
>
> "(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.
>
> "(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior,

> and on other performance factors related to effective rehabilitation of the inmate."

The regulation further provided that the unit team had the discretion to refuse to award all or part of *that portion of credits for which it had discretion,* or 20% of the total available for cooperation or non-cooperation, including the inmate's nonparticipation in programs. K.A.R. 44-6-124(b) (1989).

According to the provisions of K.S.A. 22-3717(a), an inmate "shall be eligible for parole after serving the entire minimum sentence imposed by the court, less good time credits." Under the provisions of the regulation in effect at the time of the petitioner's conviction, good time credits earned were applied to the inmate's minimum sentence to determine the date he or she was eligible for parole. The more good time credits earned, the earlier the inmate became eligible for parole. As indicated above, the petitioner in this case earned 100% of available good time credit until application of the 1993 amendment to K.A.R. 44-6-124 discussed below.

Conditional Release Date

K.A.R. 44-6-108(c) (1989), which was also in effect when the petitioner was sentenced, stated in pertinent part that "[t]o establish the conditional release date, good time credits, not forfeited, *shall be presumed earned* and shall be applied to the maximum sentence term when first computed." (Emphasis added.) Thus, an inmate's conditional release date was computed based upon the presumption that he or she would earn all good time credits available under the system then in effect. These

good time credits were then applied to the inmate's maximum sentence, thereby fixing the time the inmate was entitled to be released from incarceration, the inmate's conditional release date. Any forfeiture of good time credits because of institutional offenses after parole eligibility had been reached would result in the forfeited time being added to the inmate's conditional release date up to the maximum sentence, thereby extending the time the inmate would be incarcerated. See K.A.R. 44-6-125(b) (1989).

Thus, credits for parole eligibility had to be actually earned under the system as it existed at the time the petitioner was convicted, while good time credits for the conditional release date were awarded at the outset of his sentence. For the purposes of earning parole eligibility, an inmate with no class I offenses during the review period would receive at least 50% of the good time credits for that period. An inmate with no class I, II, III, or IV offenses was guaranteed to receive at least 80% of the allocated good time credits. The balance of the credits were discretionary and could be awarded or not awarded for a variety of reasons, including failure to constructively participate in a program. See K.A.R. 44-6-124(b) (1989).

In addition, the petitioner's conditional release date was set at the beginning of his sentence based upon the presumption that he would earn all available good time credits authorized by 22-3725. See K.A.R. 44-6-108 (1989). As the respondents state in their brief on appeal, "[a]t the time of petitioner's crime, pursuant to K.S.A. 22-3725, he was entitled to have the opportunity to be able to earn a potential total of ten (10) years of good time credit off of

his sentence." Thus, the petitioner's conditional release date was 10 years less than the maximum sentence of 20 years.

The 1993 amended version of K.A.R. 44-6-124(a) provided:

> "[f]or crimes, other than class A crimes, committed prior to July 1, 1993, an inmate may earn good time credits which shall be subtracted from the minimum sentence in order to establish a parole eligibility date or the maximum sentence in order to establish the conditional release date."

Moreover, K.A.R. 44-6-124(g) (1994) provided a marked change in awarding and withholding good time credits:

> "(g) An inmate's disciplinary record shall affect the earning of good time awards in the following manner.
>
> "(1) A guilty finding of a class I disciplinary offense shall result in the withholding of a minimum of 50% of the good time credits available for that program classification review period.
>
> "(2) A guilty finding of a class II disciplinary offense shall result in the withholding of a minimum of 25% but not more than 50% of the good time credits available for that program classification review period.
>
> "(3) A guilty finding of a class III disciplinary offense shall result in the withholding of a minimum of 10% but not more than 25% of the good time credits available for that program classification review period. . . .

. . . .

"(6) A pattern of refusal by an inmate to constructively work or participate in assigned programs *shall* result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail." (Emphasis added.)

The effect of the change on the petitioner was substantial. The trial court illustrated this point by incorporating into its memorandum decision the authorities and ruling of its earlier decision on the same issue, wherein it stated:

> "Under the prior regulations, an inmate without a disciplinary violation was automatically awarded 80% of the good time credits available for the review period with the remaining 20% left to the discretion of the unit team. Under the current regulations, an inmate without a disciplinary violation, could lose 100% of the good time credit available because of failure to participate in a program; which is exactly the plight of the petitioner."

The plight of this petitioner is the same. He refused to participate in the SATP, and under the provisions of K.A.R. 44-6-124(g)(6), his failure to participate "*shall* [and did] result in the withholding of 100% of the good time credits for that program classification review period." (Emphasis added.) Under the system in effect when the petitioner was sentenced he, without offenses, was guaranteed 80% good time credits, while under the 1993

amendment, without offenses, 100% of his good time credits were withheld because of his failure to participate in the SATP. The change applied retrospectively, altering the method by which good time credits were awarded and forfeited or withheld. It is this withholding that altered penal provisions accorded by the grace of the Department of Correction [sic] in its regulations.

In addition to affecting his or her parole eligibility date, the application of K.A.R. 44-6-124 may also have an adverse affect upon an inmate's conditional release date. K.A.R. 44-6-124 provides that

> "[f]or crimes, other than class A crimes, committed prior to July 1, 1993, an inmate may earn good time credits which shall be subtracted from the minimum sentence in order to establish a parole eligibility date *or the maximum sentence in order to establish the conditional release date.*" (Emphasis added.)

Effective March 1, 1995, the Department of Corrections adopted K.A.R. 44-6-142 (1996 Supp.), which provided in part:

> "When computing the conditional release date, it shall be presumed that prior to March 1, 1995, 100% of the available good time credits were earned. On and after March 1, 1995, good time credits shall be awarded on an earned basis pursuant to K.A.R. 44-6-124 for the purpose of determining the conditional release date."

The record is unclear whether good time credits were subtracted from the petitioner's maximum sentence prior to March 1, 1995, to establish his conditional release date based upon the withholding of 100% for his failure to

participate in the SATP. What is apparent is that in April 1994, pursuant to the 1993 amendment to K.A.R. 44-6-124, 100% of the petitioner's potential good time credits (120 days) were withheld for his failure to sign an amended SATP agreement. In August 1994, another 120 days of good time credits were withheld. Sixty more days of good time credits were withheld in April 1995, and 120 days more were withheld in October 1995. In January 1996, 120 days of good time credits were again withheld.

After March 1, 1995, good time credits would no longer be presumed but would have to be earned. However, in the petitioner's case, his failure to participate in the SATP resulted in the withholding of 100% of his good time credits. Thus, what was under the regulations in existence at the time the petitioner was sentenced a presumption that he earned all good time credits available, thereby setting his conditional release date, now becomes a matter that must be earned and is subject to 100% good time credits being withheld for failure to participate in the SATP. The respondents state in their brief:

> "At the time of petitioner's crime, pursuant to K.S.A. 22-3725, he was entitled to have the opportunity to be able to earn a potential total of ten (10) years of good time credit off of his sentence. The amendment to K.A.R. 44-6-124 did not change that, he still has the same amount of potential good time credit available, ten (10) years."

However, prior to the 1993 amendment, the petitioner's conditional release date was fixed by the presumption that all available good time credits were earned. This date

could only be changed if he lost credits for committing offenses.

The United States Constitution's ex post facto prohibition provides: "No Bill of Attainder or ex post facto Law shall be passed." U.S. Const., art. 1, § 9, cl. 3; see art. 1, § 10, cl. 1. Its prohibition forbids legislative enactment of any law which imposes a punishment for an act which was not punishable at the time it was committed or imposes additional punishment to that then prescribed. In order for a law to be considered ex post facto, two critical elements must be present. The law must be retrospective, applying to events occurring before its enactment, and it must disadvantage the offender affected by it. *Weaver v. Graham,* 450 U.S. 24, 29, 67 L. Ed. 2d 17, 101 S. Ct. 960 (1981). In *Weaver,* the United States Supreme Court noted:

> "Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense." 450 U.S. at 30-31.

Political subdivisions of a state, or quasi-legislative instrumentalities, exercising delegated legislative power are within the ambit of the Ex Post Facto Clause. 16A C.J.S., Constitutional Law § 409, p. 355. Administrative regulations adopted in accordance with the procedures set forth by the legislature have the force and effect of

law in Kansas. See K.S.A. 77-425. This statute provides in part:

> "Every rule and regulation other than a temporary rule and regulation which is filed by the state agency in the office of the secretary of state as provided in this act shall have the force and effect of law on and after the date prescribed in K.S.A. 77-426, and amendments thereto, until amended or revoked as provided by law and such amendment or revocation shall have become effective."

The Kansas Department of Corrections is a state agency. In adopting regulations governing the granting, withholding, and forfeiture of good time credits, it acts as a political subdivision exercising delegated legislative power. As such, its regulations adopted are within the ambit of the Ex Post Facto Clause of the United States Constitution.

Weaver addressed the question of whether a change in Florida's provisions for prison "gain-time credits" constituted an ex post facto law. The factual situation in *Weaver* is somewhat similar to the case at hand. Under Florida law, inmates were awarded a certain number of gain-time credits automatically simply for avoiding disciplinary infractions and for performing assigned tasks. 450 U.S. at 26. In 1978, however, the system was changed in that the number of gain-time credits awarded automatically was reduced, although extra gain-time credits were available to those inmates who performed meritorious and outstanding work. 450 U.S. at 26-27, 34-35.

The inmate in *Weaver* argued that this change in regulations constituted an ex post facto law, and the

United States Supreme Court agreed. 450 U.S. at 27-28. In reaching this conclusion, the Court noted that the availability of gain time is one determinant in an inmate's prison term and, thus, the prison term is altered when this determinant is changed. 450 U.S. at 32. The Court concluded that the Florida statute was applied retrospectively and further was disadvantageous to the petitioner and those persons similarly situated, saying:

> "On its face, the statute reduces the number of monthly gain-time credits available to an inmate who abides by prison rules and adequately performs his assigned tasks. By definition, this reduction in gain-time accumulation lengthens the period that someone in petitioner's position must spend in prison. . . . Here, petitioner is . . . disadvantaged by the reduced opportunity to shorten his time in prison simply through good conduct." 450 U.S. at 33-34.

The Court in *Weaver* stated that it did not matter that Florida's new statutory scheme enabled the inmate to earn more good time credits through satisfying extra conditions. 450 U.S. at 35. The Court noted:

> "The fact remains that an inmate who performs satisfactory work and avoids disciplinary violations could obtain more gain time per month under the repealed provision [citation omitted], than he could for the same conduct under the new provision [citation omitted]. To make up the difference, the inmate has to satisfy the extra conditions specified by the discretionary gain-time provisions. Even then, the award of the extra gain time is purely discretionary, contingent on both the wishes of the correctional authorities and special behavior by the inmate,

> such as saving a life or diligent performance in an academic program." 450 U.S at 35.

Accordingly, the Court found that the new regulations were ex post facto as applied to Weaver. 450 U.S. at 36.

Weaver was cited by the United States District Court for the Western District of Oklahoma in another case similar to the one at hand. See *Spradling v. Maynard*, 527 F. Supp. 398 (W. D. Okla. 1981). In *Spradling*, the statutes in effect prior to September 1976 provided a system similar to that in Kansas where good time credits were automatically applied to an inmate's sentence, although they could later be forfeited for disciplinary infractions. Oklahoma then amended the system to one in which the inmate was forced to earn the credits. In finding that the change constituted an ex post facto law as applied to the complaining inmate, the court stated:

> "It is clear from a reading of the provisions of § 138, as they existed prior to September 8, 1976 and as they exist at this time, that the amendment of that provision in 1976 required an inmate to 'earn' credits by satisfying certain conditions, whereas previously such credits were automatic, subject only to being forfeited at a later date for disciplinary reasons. As in *Weaver*, the 1976 amendment made more onerous the punishment for crimes committed before its enactment. Thus, under *Weaver*, petitioner, and others similarly situated, are entitled to the benefits of § 138 as it existed prior to September 8, 1976, *i.e.*, the automatic "good time" credits against sentences imposed for crimes committed before September 8, 1976. . . . " 527 F. Supp. at 404.

The petitioner's position is similar to those in *Weaver* and *Spradling*. At the time the petitioner was sentenced, he would, absent disciplinary infractions, earn 80% of his available good time credits, with the remaining 20% subject to discretionary award by the unit team manager. K.A.R. 44-6-124 (1989). While this 20% may have been forfeited for failure to participate in rehabilitation programs, no provision within the regulations in effect at the time the petitioner was sentenced related to the forfeiture or withholding of all available good time credits for such failure. These good time credits were applied to the petitioner's minimum sentence of 10 years to determine his parole eligibility date.

After the adoption of the 1993 amendments to K.A.R. 44-6-124 which expressly applied to the petitioner, 100% of the petitioner's good time credits were mandatorily withheld based upon his refusal to participate in the SATP. See K.A.R. 44-6-124(g)(6). The result in the petitioner's case was to extend the time he would have to serve before being eligible for parole. Thus, the regulation as applied to the petitioner was retrospective in that it applied to events occurring before its enactment and it disadvantaged the offender affected by it. See *Weaver*, 450 U.S. at 29.

Moreover, the 1993 amendment to K.A.R. 44-6-124(g)(6), in conjunction with the 1995 amendment to K.A.R. 44-6-142, changed the way the petitioner's conditional release date was determined. As the petitioner was convicted and began his sentence, he was presumed to earn all available good time credits or 10 years. See K.A.R. 44-6108(c) (1989); K.A.R. 44-6-142 (1989). After the 1995 amendment he was required to earn good time

credits, and his failure to participate in the SATP resulted in the loss of 100% of his good time credits as it related to his conditional release date. The effect upon the petitioner was to extend his conditional release date based upon his failure to earn good time credits because of his refusal to participate in the SATP. Again, the regulation as applied to the petitioner was retrospective in that it applied to events occurring before its enactment, and it disadvantaged the offender affected by it. See *Weaver*, 450 U.S. at 29.

Does it matter that the 1993 amendment to K.A.R. 44-6-124(g)(6) uses the term "withholding" rather than "forfeiting"? In *Gilmore v. McKune*, 22 Kan. App. 2d 167, 169-70, 915 P.2d 779 (1995), the Court of Appeals found that there was a distinction between the withholding of good time credits and the forfeiture of good time credits, with the latter constituting a penalty but the former not doing so. The distinction by the Court of Appeals is that forfeited good time credits such as those for disciplinary actions may not be restored to the inmate while withheld good time credits may presumably be restored. However, whether the good time credits are withheld or forfeited, inmates under the prior system are still subject to a loss of such credits for their failure to participate in the SATP in that good time credits which have already been awarded to them are withheld. Therefore, as to the petitioner and others similarly situated, the Court of Appeals' decision in *Gilmore* does not apply.

The respondents argue that the recent decision of the United States Supreme Court in *California Dept. of Corrections v. Morales*, 514 U.S. 499, 131 L. Ed. 2d 588, 115 S. Ct. 1597 (1995), changes the *Weaver* analysis and, therefore,

should change the result in this case. In *Morales,* the Court addressed a statutory change which lengthened the period of time between parole hearings. The Court determined that the application of the increased time between parole hearings to inmates whose crimes were committed before the change did not constitute an ex post facto violation. 514 U.S. at 514. In doing so, the Court refined the ex post facto analysis, stating that rather than focusing on whether the change in the law worked to the disadvantage of the inmate, the focus should be on whether the change alters the definition of criminal conduct or increases the penalty by which a crime is punishable. See 514 U.S. at 506-07, n.3.

Morales does refine the focus of the ex post facto analysis. However, *Morales* does not compel a contrary result with regard to the award of good time credits used to calculate conditional release in this case. The effect of the 1993 amendment was to force the petitioner to earn credits he had already been awarded, and for each good time credit the petitioner failed to earn, his conditional release date and, thus, the actual term of his punishment, would be extended. Thus, even under the *Morales* analysis, the application of the 1993 amendment to those good time credits used to calculate the petitioner's conditional release date would be ex post facto.

With regard to the award of good time credits used to calculate parole eligibility, the question is much closer. In *Morales,* the Court noted that the focus should not be on whether an amendment affects a prisoner's " 'opportunity to take advantage of provisions for earlier release.' " 514 U.S. at 506-07, n.3. This would seem to suggest that if the effect of the 1993 amendment on the good time credits

used to calculate parole eligibility is to merely alter the petitioner's opportunity to take advantage of provisions for early release, it does not constitute an ex post facto application of law. However, the amendment we deal with in this case goes beyond merely allowing the petitioner an opportunity to take advantage of provisions for an earlier release date. The amended regulation actually forces the petitioner to engage in the required program or risk the loss of good time credits which would automatically be earned under the old system. As a result, it has a very direct effect on the petitioner's parole eligibility and also constitutes an ex post facto application of law.

As a result, the district court was correct in determining that the application of the 1993 amendment to K.A.R. 44-6-124(g)(6) to the petitioner constituted an ex post facto application of law. The respondents' appeal must fail. Based upon our conclusion, we need not address the questions raised by the petitioner's cross-appeal regarding whether the 1993 amendment constitutes a denial of due process or a violation of the petitioner's Fifth Amendment rights.

Internal Management Procedures and Policies

The petitioner also contends in his cross-appeal that subjecting him to the IMPP 11-101 level system because of his failure to participate in the SATP violated his due process rights. In order to properly address this issue, some background on the level system created by IMPP 11-101 is necessary.

IMPP 11-101 is an internal management policy and procedure concerning offender privileges and incentives.

Under IMPP 11-101, inmates can earn certain privileges, including television ownership, handicrafts, participation in organizations, use of outside funds, canteen expenditures, property, incentive pay, and visitation. Under IMPP 11-101, there are several levels of privileges. At Level I, the level at which the petitioner was placed following his refusal to participate in the SATP, the inmate may not have a personal television but has access to general television. Inmates at Level I are limited in activities, have limited expenditures at the canteen up to $20, may earn up to 60¢ per day in incentive pay, and may receive visitors from immediate family. At Level III, the highest level for inmates, the inmate may purchase a personal television, spend up to $140 in the canteen on a more extensive list of items, and may have any approved visitor.

In order to move from level to level, the inmate must remain free of class I or class II disciplinary reports and demonstrate a willingness to participate in recommended programs and/or work assignments for a full review cycle of a minimum of 120 days. An inmate may lose levels for disciplinary offenses and is automatically reduced to Level I in the event the inmate is terminated from a work program for cause, refuses to participate in a recommended program such as SATP, commits felony offenses or has serious disciplinary offenses.

When an inmate loses levels, property items which the inmate is no longer authorized to have are removed from the facility. The first time an inmate is removed from Level II or III to Level I, unauthorized items purchased by the inmate at the canteen such as televisions, sound equipment, and large appliances are stored for the inmate

at the facility and returned to the inmate when the inmate advances back to a level at which they are authorized. However, if the inmate is returned to Level I a second time or fails to advance to Level II at the earliest possible time, these items are removed from the facility.

When an item is removed from the facility, the inmate has the choice of having the item mailed to an address of the inmate's choosing at the inmate's expense or with the approval of the warden at the expense of the facility, donating the item to charity, having the property picked up by an authorized person, or having the property delivered to a local address by the facility upon the approval of the warden. At the time IMPP 11-101 was implemented on January 1, 1996, all inmates currently incarcerated were placed at Level III, the highest level available. At this level, the inmates enjoyed the same privileges that existed prior to implementation of IMPP 11-101.

The petitioner contends that as the result of his nonparticipation in the SATP, he was made subject to IMPP 11-101 and reduced to Level I, with the result being that certain privileges and property that he had been allowed were taken away. He contends that this violated due process.

As we have already noted, the petitioner did not raise this argument before the district court. Instead, he argued that subjecting him to IMPP 11-101 was an ex post facto application which he appears to have abandoned. Ordinarily, issues not raised before the trial court cannot be raised on appeal. *Ripley v. Tolbert*, 260 Kan. 491, Syl. ¶ 6, 921 P.2d 1210 (1996). However, we have recognized

an exception to this rule where consideration of the issue is necessary to serve the ends of justice or to prevent the denial of fundamental rights. See *State v. Bell*, 258 Kan. 123, 126, 899 P.2d 1000 (1995). As the due process issue raised in the petitioner's appeal is an important one, we now address it.

The first step in this analysis is to determine whether the petitioner's property interests were infringed upon. The petitioner contends that when he was reduced to Level I, his personal property was confiscated.

The Court of Appeals has held that when inmates are afforded the opportunity to possess personal property, they enjoy a protected interest in that property that cannot be infringed upon without due process. *Bryant v. Barbara*, 11 Kan. App. 2d 165, 167-68, 717 P.2d 522, *rev. denied*, 239 Kan. 693 (1986). This reasoning is sound, in that once an inmate owns certain property, the ownership of that property may not be taken from him or her without due process of law. However, there is a difference between the inmate's ownership rights in the property and the inmate's right to possess the property while in prison.

Under IMPP 11-101, when an inmate is reduced to Level I so that certain property which is in his or her possession may no longer be possessed by the inmate in prison, the property is not taken from his or her ownership. Instead, if this reduction to Level I is the first for the inmate, the property is stored at the institution until the inmate has either regained a level or failed to advance. If the inmate does regain a level, the inmate receives the property back. Otherwise, in every other case where the

reduction to Level I is not the first such reduction for the inmate, the property must leave the institution. However, this does not deny the inmate ownership of the property. Instead, the inmate has the choice of having the item mailed to an address of the inmate's choosing at the inmate's expense or with the approval of the warden at the expense of the facility, donating the item to charity, having the property picked up by an authorized person, or having the property delivered to a local address by the facility upon the approval of the warden.

Courts have held that where an inmate has been allowed to send property the inmate owns but is not allowed to possess in prison from the institution to an address of his or her own choosing, the inmate has not been deprived of the property so as to implicate the due process clause. See *Williams v. Meese*, 926 F.2d 994, 998 (10th Cir. 1991); *Pryor-El v. Kelly*, 892 F. Supp. 261, 271 (D.D.C. 1995). Thus, although the petitioner was not allowed possession of the property in the case at hand, he did not lose ownership of the property, and therefore there was no taking sufficient to implicate due process.

Next, this court must address whether the restrictions imposed by IMPP 11-101 infringed upon the protected liberty interest of the petitioner. The first question in this analysis is whether the petitioner had a liberty interest in being allowed to possess certain property or enjoy certain activities and status available to him at Level III but denied at Level I. In *Sandin v. Conner*, 515 U.S. 472, 132 L. Ed. 2d 418, 115 S. Ct. 2293 (1995), the United States Supreme Court held that while states may under certain circumstances create liberty interests, these interests will be generally limited to freedom from restraint which imposes an atypical and significant

hardship on the inmate in relation to the ordinary incidents of prison life. See *Murphy v. Nelson*, 260 Kan. 589, 600-01, 921 P.2d 1225 (1996).

The restrictions imposed at Level I do not impose an atypical or significant hardship on the petitioner in relation to the ordinary incidents of prison life. While the petitioner is denied the use of certain personal electronic equipment, this does not impose a significant hardship. Nor do the restrictions on purchases at the canteen or the types of purchases and personal property allowed constitute an atypical hardship. While Level I has a restriction on visitation, the United States Supreme Court has held that the denial of prison access to a particular visitor is well within the terms of confinement ordinarily contemplated by a prison sentence. See *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989). Also, while Level I imposes some incentive pay restrictions, it has been held that an inmate does not have a constitutionally protected interest in employment. See *Templeman v. Gunter*, 16 F.3d 367, 370 (10th Cir. 1994). It is true that the test for whether a restriction is a significant hardship is not whether such restriction would violate due process on its own. See *Sandin*, 515 U.S. at 486. However, neither the restrictions on visitation nor incentive pay constitute a significant or an atypical hardship on an inmate which would not have been contemplated in his or her original sentence.

As a result, the application of IMPP 11-101 to the petitioner does not violate process.

Affirmed.

McFARLAND, C.J., dissenting.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 78,722

MICHAEL A. BANKES,
Appellant,

v.

CHARLES SIMMONS, et al.,
Appellees.

SYLLABUS BY THE COURT

1.

Proceedings on a petition for writ of habeas corpus filed pursuant to K.S.A. 60-1501 are not subject to ordinary rules of civil procedure. To avoid summary dismissal of a K.S.A. 60-1501 petition, allegations must be made of shocking and intolerable conduct or continuing mistreatment of a constitutional stature.

2.

The Fifth Amendment to the United States Constitution not only permits a person to refuse to testify against himself or herself at a criminal trial in which he or she is the petitioner, but also gives the person the privilege not to answer official questions in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate that person in future criminal proceedings.

3.

A witness protected by the privilege against self-incrimination may rightfully refuse to answer questions that would incriminate the witness unless and until he or she is protected at least against the use of his or her compelled answers and evidence derived therefrom in

any subsequent criminal case in which he or she is a defendant. Absent such protection, if the witness is nevertheless compelled to answer, the witness' answers are inadmissible against him or her in a later criminal prosecution.

Appeal from Reno district court; WILLIAM F. LYLE, JR., judge. Opinion filed June 5, 1998. Affirmed in part and reversed in part.

Michael K. Lehr, of Wichita, argued the cause and was on the brief, for appellant.

Timothy G. Madden, Chief Legal Counsel, Kansas Department of Corrections, argued the cause and was on the brief, for appellees.

The opinion of the court was delivered by

ABBOTT, J.: This is a habeas corpus action brought by Michael A. Bankes, a prisoner in the Hutchinson Correctional Facility (HCF). Bankes was convicted of indecent liberties with a child and sentenced to 4 to 15 years in prison in 1990. Some time after his sentencing, Bankes' unit team at the HCF recommended that he participate in the Sexual Abuse Treatment Program (SATP). In order to be admitted into SATP, Bankes was required to admit guilt for the crime of which he was convicted. This admission of guilt, along with any other information which Bankes conveyed to SATP counselors, could be turned over to authorities and used against Bankes in future proceedings. Due to this required admission of guilt, Bankes refused to participate in SATP. As a result of

his refusal to participate in SATP, Bankes' privilege incentive level was reduced from a level 2 to a level 1, pursuant to the Kansas Department of Corrections Internal Management Policies and Procedures (IMPP) Rule 11-101 (1998). Because of this reduction in his privilege incentive level, Bankes lost his personal TV and certain canteen privileges. Moreover, for each program review period in which Bankes refused to participate in the recommended SATP, he did not receive any good time credits pursuant to K.A.R. 44-6-134. This denial of good time credits resulted in an extension of Bankes' parole eligibility date and his conditional release date. Both IMPP 11-101 and K.A.R. 44-6-124 were amended to create this outcome after Bankes had been sentenced and served part of his sentence. Based on these consequences for his refusal to participate in SATP, Bankes filed a petition for habeas corpus in Reno County District Court, alleging that K.A.R. 44-6-124 violated his privilege not to incriminate himself and constituted an ex post facto law. The Reno County District Court dismissed Bankes' habeas corpus petition for failure to state a claim. Bankes appealed this ruling to the Court of Appeals. The case was transferred to this court pursuant to K.S.A. 20-3018(c).

Bankes' 4- to 15-year sentence did not include any order for Bankes to participate in any kind of psychological or psychiatric treatment for sexual offenders. The Kansas Department of Corrections (KDOC) placed Bankes in the Hutchinson Correctional Facility (HCF). At the time of his placement with the HCF, Bankes was not ordered to participate in any kind of psychological or psychiatric counseling for sexual offenders.

Further, at the time Bankes was sentenced to prison, KDOC had set out regulations in K.A.R. 44-5-104 and K.A.R. 44-5-105. K.A.R. 44-5-105 required that all inmates incarcerated in a KDOC facility be subject to a program plan conducted by a unit team within 1 month of an inmate's admission into prison. The plan could assign an inmate to participate in a certain program, but "the inmate [could] not be penalized for refusal to participate in a formal program plan." K.A.R. 44-5-104 classified the security level of the inmate. The inmate's security level determined his supervision requirements and his allowable privileges and freedoms. The factors necessary to determine an inmate's security level, pursuant to K.A.R. 44-5-104, and the supervision and privileges associated with each level were set out in the Secretary of Corrections' Internal Management Policies and Procedures manual (IMPP).

On February 9, 1993, and July 11, 1994, Bankes' program plan was reviewed by his unit team. These reviews did not order Bankes to attend a program for sexual offenders, and it classified Bankes as a medium security inmate pursuant to K.A.R. 44-5-104.

Good time credits are applied to an inmate's minimum sentence to determine his or her parole eligibility date and are applied to the inmate's maximum sentence to determine his conditional release date. K.A.R. 44-6-101(g), (m); K.A.R. 44-6-108. Upon reaching the conditional release date, an inmate is entitled to be released. See K.S.A. 22-3718; *Beck v. Kansas Adult Authority*, 241 Kan. 13, 29, 735 P.2d 222 (1987).

K.A.R. 44-6-108(c), which was in effect when Bankes committed his crime, stated, in pertinent part, that "[t]o establish the conditional release date, good time credits, not forfeited, *shall be presumed earned* and shall be applied to the maximum sentence term when first computed." (Emphasis added.) Thus, it was presumed for the purpose of conditional release that the inmate earned all available good time credits, and his or her conditional release date was predicated on that presumption. For parole eligibility, on the other hand, no such presumption applied, and the credits were tallied as earned to establish parole eligibility. See K.A.R. 44-6-108(b) (1989).

K.A.R. 44-6-124 (1989) provided guidelines for awarding good time credits *for parole eligibility*. No guidelines for the award of good time credits for conditional release were necessary, as 100% was presumed. The regulation stated:

> "(1) Inmates with no class I offenses during the review period shall receive at least 50% of good time credits allocated for that period.
>
> "(2) Inmates with no class I or II offenses during the review period shall receive at least 60% of the good time credits allocated for that period.
>
> "(3) Inmates with no class I, II, or III offenses during the review period shall receive at least 70% of the good time credits allocated for that period.
>
> "(4) Inmates with no class I, II, III or IV offenses during the review period shall receive at least 80% of the good time credits allocated for that period.

> "(5) The balance of the credits above the percentages listed in paragraphs (a)(1) to (a)(4) shall be awarded by the unit team based on factors of good work, behavior, and on other performance factors related to effective rehabilitation of the inmate." K.A.R. 44-6-124(a) (1989).

The regulation went on to further provide that the unit team had the discretion to refuse to award all or part of *the portion of credits for which it had discretion* based on an inmate's refusal to participate in recommended programs. K.A.R. 44-6-124(b) (1989).

K.A.R. 44-6-125(b) provided for the forfeiture of those good time credits "earned" for parole eligibility as well as those used to "create the conditional release date." It stated:

> "Forfeit only on minimum until parole eligibility. Prior to parole eligibility, forfeited good time credits shall be subtracted from the amount of good time credits earned toward the parole eligibility only, and not from those credits used to create the conditional release date. After parole eligibility is established, forfeited credits shall be subtracted from the credits used to form the conditional release date." K.A.R. 44-6-125(b)(1989).

Thus, for purposes of parole eligibility, an inmate under the system as it existed at the time of Bankes' conviction was forced to earn his or her good time credits toward parole eligibility, while good time credits for a conditional release date were awarded at the outset. For the purposes of earning parole eligibility, an inmate with no class I offenses during the review period would receive at

least 50% of the good time credits for that period. An inmate with no class I, II, III, or IV offenses was guaranteed to receive at least 80% of the allocated good time credits. The balance of the credits were discretionary and could be awarded or not awarded for failure to participate in a program.

In January 1995, KDOC amended K.A.R. 44-6-124 to its present form. In pertinent part, it provided that "[a] refusal by an inmate to constructively work or participate in assigned programs shall result in the withholding of 100% of the good time credits for that program classification review period, unless the inmate is determined by the facility health authority to be physically or mentally incapable of working or participating in a particular program or detail." K.A.R. 44-6-124(g)(6). K.A.R. 44-6-142 was also amended and now provides that, rather than all available good time credits being presumed earned for purposes of conditional release, such credits were now subject to being earned as the sentence progressed, in the same manner as used for the calculation of parole eligibility.

In addition to these regulatory amendments, the Secretary of Corrections also revised the Department's internal management policies and procedures. Under IMPP 11-101, KDOC defined a new privilege incentives level system, the factors necessary to move up or down an incentive level, and the supervision and privileges associated with each level. This revised IMPP 11-101 is called the "Level System," and it created a system of incentives and privileges to encourage inmates to participate in programs. Under the level system, there are three levels at which an inmate can be classified. Under level 1,

inmates can watch the general TV and spend $20 per payroll period at the canteen. Under level 2, an inmate can have a personal TV, and the inmate can spend $80 per payroll period at the canteen. Obviously, the higher the level at which an inmate is classified, the more privileges and liberties the inmate receives. Under IMPP 11-101, if an inmate is assigned to participate in a certain program and the inmate refuses, then the inmate can be moved down an incentive level and lose the privileges associated with the higher level.

In 1995, Bankes participated in a 120-day program plan review by his unit team. He was assigned to participate in SATP. Bankes refused to voluntarily sign the program review or to participate in SATP. Pursuant to K.A.R. 44-6-124, 100% of Bankes' good time credits for this review period were withheld due to his refusal to participate in the assigned program.

At his next program review, the unit team again suggested that Bankes participate in SATP. Bankes continued to refuse to participate in such treatment. Pursuant to K.A.R. 44-6-124, 100% of Bankes' good time credits were again withheld due to his refusal to participate in SATP. Eventually, Bankes was reclassified, under IMPP 11-101, from a level 2 of privileges and incentives to a level 1, due to his refusal to participate in SATP, and Bankes lost the privileges associated with a level 2.

One of the main reasons Bankes refused to participate in SATP is that SATP requires each offender to "accept responsibility for the offense in which he was involved." In order to voluntarily be admitted into SATP, the program requires that the offender admit guilt to the

crime of which he or she was convicted. As the SATP admission document states:

> "This is to confirm that I understand the criteria for being accepted into the S.A.T.P. (Sexual Abuse Treatment Program) at Hutchinson Correctional Facility, which includes an admission of Guilt for my sex crime. I realize that I am being allowed to participate in an evaluation for acceptance into S.A.T.P. with the understanding that I followed through with an Admission of Guilt. This document will serve as my official Admission of Guilt to the following: [space provided for the inmate to write in the crime to which they are admitting guilt]."

Bankes objected to this admission of guilt requirement and refused to participate in SATP because of this requirement. At trial, Bankes denied that he committed the crime. Bankes continues to deny that he committed the crime and is currently pursuing an appeal of his conviction in federal court. According to Bankes, confessing guilt for the purpose of admission into SATP would jeopardize his appeal and subject him to perjury charges based on his testimony at trial.

In addition to requiring an admission of guilt for the crime for which the inmate is convicted, SATP also requires a participant to sign releases allowing the disclosure of confidential information gained by the SATP staff to KDOC personnel, the Kansas Parole Board, and HCF-SATP coordinator and staff.

Further, SATP requires participants to submit to polygraph testing as a part of the "treatment process." An unwillingness to participate in the polygraph testing as a

part of the treatment is considered a violation of the program agreement and can result in the termination of SATP treatment. Prior to taking a polygraph test, the SATP participant must provide an admission of guilt in his or her own words, an autobiography, a complete sexual history, and a complete confidential polygraph questionnaire. The polygraph results are only to be used for therapeutic purposes and are not to be used to determine guilt or innocence.

Finally, SATP requires participants to submit to a plethysmograph examination to evaluate the inmate's sexual arousal intensity and interests. Although the plethysmograph testing is voluntary, if the inmate should refuse to complete the evaluation or fail to cooperate with the evaluation, it will be noted and reported to the SATP treatment team and may constitute grounds for termination from the program.

In 1994, the Kansas Legislature enacted K.S.A. 59-29a01 *et seq.*, the Kansas Commitment of Sexually Violent Predators Act. Under this Act, if KDOC has information about an inmate convicted of a sexually violent offense which indicates that the inmate has a mental abnormality or personality disorder and meets the criteria for a sexually violent predator, then KDOC must give written notice of this information to the Attorney General before the inmate is released from prison so that the Attorney General can evaluate whether the inmate is a sexually violent predator and, if so, pursue commitment proceedings. KDOC is required to turn over this information even if it was gained through SATP. K.S.A.1997 Supp. 59-29a16; K.S.A.1997 Supp. 59-29a03.

The effect of the amendments to IMPP 11-101 and K.A.R. 44-6-124 on Bankes has been substantial. Prior to his refusal to participate in SATP, Bankes was assigned to a level 2 incentive level. Under this level, he was allowed his own personal TV and was allowed to spend $80 per pay period at the canteen. However, once Bankes refused to participate in SATP, his incentive level was reduced from a level 2 to a level 1 pursuant to IMPP 11-101. This reduction in incentive level resulted in Bankes losing access to his own personal TV and only being allowed to spend $20 per pay period at the canteen. Further, the amendments to K.A.R. 44-6-124 have affected both Bankes' parole eligibility date and his conditional release date. Prior to the 1993 amendment, his conditional release date was fixed by the presumption that all available good time credits were earned. Thereafter, that date could only be changed if he lost credits for committing offenses. However, under the 1993 amendment, Bankes became subject to a mandatory loss of 100% of his good time credits for failing to participate in a program. Thus, if he failed to participate, he would stop earning good time credits, and for every good time credit he failed to earn, his conditional release date would be extended. Thus, Bankes is now forced to earn good time credits toward conditional release, whereas under the prior regulations, he could only lose them for his improper behavior. He is also forced to earn good time credits toward parole eligibility, whereas previously he was guaranteed at least a percentage (80%) of available credits should he not have any Class I, II, III, or IV offenses.

The withholding of Bankes' earned good time credits lengthens his sentence for each plan review period he

continues to refuse to participate in SATP. Thus far, KDOC's action has lengthened his parole eligible date from November 26, 1994, as of February 9, 1993, to at least November 8, 1998, as of June 21, 1996, assuming he earns all his future good time credits by participation in SATP. His conditional release date has been lengthened from November 11, 2009, at the time of his incarceration, to at least May 5, 2011, as of November 5, 1996, assuming he earns all future good time credits. Bankes' release date, without receiving any future good time credits due to his continued refusal to participate in SATP, is July 21, 2024. This increase in jail time results from his refusal to participate in SATP, which requires him to not only admit to the crime he was convicted of, but to admit to other possible violations of the law by providing a complete sexual history to his SATP therapists. Should Bankes make these admissions, they can be released to law enforcement agencies without any guarantee that they will not be used against Bankes in any future criminal proceeding.

On December 26, 1996, Bankes filed this habeas corpus action in the District Court of Reno County against his unit team members, the HCF warden, and the Secretary of KDOC. In this action, Bankes claims that KDOC's requirement that he admit guilt for the crime of which he was convicted and participate in SATP violates his privilege not to incriminate himself as embodied in the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. Further, Bankes asserts that K.A.R. 44-6-124, which mandates KDOC to withhold his good time credits for refusing to participate in SATP, constitutes an ex post facto law by

increasing the punishment for a crime for which he had already been convicted. The District Court of Reno County dismissed Bankes' habeas corpus petition for failure to state a claim for which relief could be granted. Bankes appealed.

I. FIFTH AMENDMENT

> "Proceedings on a petition for writ of habeas corpus filed pursuant to K.S.A. 60-1501 are not subject to ordinary rules of civil procedure. To avoid summary dismissal of a K.S.A. 60-1501 petition, allegations must be made of shocking and intolerable conduct or continuing mistreatment of a constitutional stature." *Swisher v. Hamilton*, 12 Kan. App. 2d 183, Syl. ¶ 1, 740 P.2d 95 (1987), *rev. denied*, 242 Kan. 905 (1987).

The question of whether K.A.R. 44-6-124 violates Bankes' privilege not to incriminate himself or whether it is an ex post facto law is a question of law. The district court found there was no merit to this question and dismissed Bankes' habeas corpus petition for failure to state a claim. However, "this court's review of conclusions of law is unlimited." *Gillespie v. Seymour*, 250 Kan. 123, 129, 823 P.2d 782 (1991). Thus, the district court's conclusions are not binding on this court.

The Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights provide identical language that "[n]o person 'shall be compelled in any criminal case to be a witness against himself.' " The Kansas Supreme Court has ruled that the provisions of § 10 of the Kansas Constitution Bill of

Rights grant no greater protection against self-incrimination than does the Fifth Amendment to the United States Constitution. The purpose of the constitutional provisions, both state and federal, is to prohibit the compelling of self-incriminating testimonial or communicative acts from a party or a witness.

The Fifth Amendment not only permits a person to refuse to testify against himself at a criminal trial in which he is the petitioner, but also "privileges him not to answer official questions in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426, 79 L. Ed. 2d 409, 104 S. Ct. 1136 (1984), *reh. denied*, 466 U.S. 945 (1984); *Lefkowitz v. Turley*, 414 U.S. 70, 77, 38 L. Ed. 2d 274, 94 S. Ct. 316 (1973). In all such proceedings:

> "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution." *Lefkowitz*, 414 U.S. at 78; see *Minnesota v. Murphy*, 465 U.S. at 426.

In *Allen v. Illinois*, 478 U.S. 364, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986), the defendant challenged the Illinois State Sexually Dangerous Persons Proceedings Act. The defendant was charged with committing the crimes of unlawful restraint and deviant sexual assault. The State of Illinois filed a petition to have the defendant declared

a sexually dangerous person under an Illinois involuntary commitment procedure. Two psychiatrists testified at the commitment trial and gave an opinion as to the defendant's sexual dangerousness. Based in part on this testimony, the trial court committed the defendant as a sexually dangerous person. The defendant appealed his commitment to the United States Supreme Court. The Court held that the Illinois proceeding for involuntary commitment of a sexually dangerous person was a civil proceeding, as opposed to a proceeding of a "criminal" nature. Therefore, it concluded, the defendant's Fifth Amendment privilege against self-incrimination did not apply to him during such proceedings; thus, his Fifth Amendment privilege was not violated. However, in upholding the statute, the United States Supreme Court specifically noted that the Illinois Supreme Court had ruled that a person the State attempts to commit under the Act *is protected from the use of his or her compelled* answers in a psychiatric evaluation *in any subsequent criminal case,* as opposed to civil, in which he is the defendant. 478 U.S. at 368.

In Kansas, as in Illinois, commitment as a sexually violent predator is a civil proceeding, not a criminal proceeding. Since the Fifth Amendment does not apply in civil settings, the petitioner's compelled information required by SATP *can* be used against him in a civil commitment proceeding as a sexually violent predator. The *Allen* case does not allow the use of compelled information in future criminal cases – other sex crimes, perjury, etc. – but it does allow use of the compelled information in future civil cases, such as a commitment for a sexually violent predator.

In view of our ruling this day in *Stansbury v. Hannigan*, 265 Kan. ___, ___ P.2d ___ (1998), that the 1993 amendment to K.A.R. 44-6-124(g)(6) violated the Ex Post Facto Clause to the United States Constitution, we follow that decision. Later in this case, we find that many of the defendant's arguments concerning the Fifth Amendment are moot.

The United States Supreme Court has held that the Sexual Predator Act, allowing a person's confinement for treatment as a violent sexual offender, is civil in nature; thus, the Fifth Amendment to the United States Constitution does not apply. We see no valid reason to interpret § 10 of the Kansas Constitution Bill of Rights any differently. This, however, does not end our inquiry. The question remains as to information the defendant must furnish which subsequently can be used against him in a criminal proceeding. The State of Kansas must either give the defendant immunity from prosecution, or be subject to the well-recognized policies behind the privilege of self-incrimination and the legitimate need of governments to protect its children. Thus, if the State coerces a defendant into furnishing possible incriminating testimony by giving a prisoner no choice but to furnish incriminating information or serve a longer sentence for failure to do so, the State may not use that information or its fruits in subsequent criminal proceedings. See *Lefkowitz v. Turley*, 414 U.S. 70; *Allen v. Illinois*, 478 U.S. 364. We again note that the coerced information can be used in a civil proceeding, subject to the rules of evidence.

The housing assignment given to an inmate, his or her custody classification, granting of parole, spending

limitations at a canteen, regulation of visiting hours, withholding of good time awards, and regulation of other daily activities which are not atypical and do not pose a significant hardship within a prison, do not involve a liberty interest or violate the defendant's Fifth Amendment right by compelling him to incriminate himself and participate in SATP. See *Riddle v. Mondragon*, 83 F.3d 1197 (10th Cir. 1996); *Lile v. Simmons*, 23 Kan. App. 2d 1, 929 P.2d 171 (1996); *Gilmore v. McKune*, 22 Kan. App. 2d 167, 915 P.2d 779 (1995); *Davis v. Finney*, 21 Kan. App. 2d 547, 902 P.2d 498 (1995).

In *State v. Imlay*, 249 Mont. 82, 813 P.2d 979 (1991), the question, similar to the one in the case at hand, was whether an inmate could be compelled, as a prerequisite to admission in a sexual therapy program, to admit guilt, where completion of such a program was required in order to allow him to keep his suspended sentence. 249 Mont. at 83. The Montana Supreme Court found that compelling the inmate to do so would cause a Fifth Amendment violation, *absent any grant of immunity for the statements*. 249 Mont. at 91. In so finding, the Montana Supreme Court reasoned:

> "Even though the defendant has already been convicted of the crime that he denies, our system still provides, as noted in [*Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966)], for opportunities to challenge that conviction. For example, the defendant still had the right to challenge his conviction, based on newly discovered evidence, or by collateral attack. These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant

> could be compelled to admit guilt as a condition to his continued freedom. Furthermore, while such a defendant would be foreclosed from invoking the protection of such procedures to establish his innocence, the reliability of an admission of guilt under such circumstances would be highly suspect. In addition, by admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, not only as to the crime for which he has been convicted, but also to the crime of perjury. He testified in his own defense during his trial and denied committing the offense with which he was charged." 249 Mont. at 90-91.

Upon analyzing questions in conjunction with an inmate's probation, the United States Supreme Court noted in *Minnesota v. Murphy*:

> "Our cases indicate, moreover, that a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, *as long as it recognizes the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination*. Under such circumstances, a probationer's 'right to immunity as a result of his compelled testimony would not be at stake'. [Citations omitted.]" 465 U.S. at 435 n. 7.

Thus, respondents, in administering their Sexual Abuse Treatment Program, can insist that the petitioner admit responsibility, so long as his or her admission is not used against the petitioner in later *criminal* proceedings.

This is not a terribly satisfactory outcome. Bankes stands convicted of the offense, but maintains his innocence. He would consequently be forced to admit guilt which he does not acknowledge in order to participate in SATP and to keep his level 2 privileges. Whether Bankes and society will benefit from Bankes' treatment under those circumstances is not for the court to decide in this case. However, this situation does not appear to rise to the level of a Fifth Amendment violation; thus, this issue fails.

II. EX POST FACTO

Bankes argues that K.A.R. 44-6-124 constitutes an ex post facto law. According to Bankes, this regulation imposes an additional punishment on him after he had already been sentenced for the crimes of which he was convicted.

This issue has been decided on this day in *Stansbury*, 265 Kan. ___. To the reasoning in that case, we would add that trial judges are aware of conditional release dates and how they are computed. When the defendant was sentenced, most trial judges would have considered the maximum time the defendant would have to serve in setting the sentence.

For the reasons set forth in *Stansbury*, the application of K.A.R. 44-6-124 by KDOC to Bankes, due to his refusal to participate in SATP, violates the ban on ex post facto laws contained in the United States Constitution. Thus, as to the ex post facto issue only, the trial court's dismissal of Bankes' habeas corpus petition for failure to state a claim is reversed.

MCFARLAND, C.J., concurring and dissenting: I dissent from the majority opinion's determination that K.A.R. 44-6-124 constitutes an ex post facto law in reliance upon *Stansbury v. Hannigan*, No. 79,384, this day decided. I concur with the balance of the majority opinion.

LOCKETT, J., concurring and dissenting: I dissent from the majority's determination that withholding good time credits from a person who claims to be innocent and will not acknowledge guilt in order to participate in sexual abuse treatment program does not rise to the level of a Fifth Amendment violation. The majority requires an individual who may or may not be innocent to serve a longer sentence than those who admit guilt. Punishing Bankes for refusing to admit guilt is not violative of Bankes' constitutional rights under the Fifth Amendment, it is violative of Bankes' constitutional equal protection and due process rights under the Fourteenth Amendment.

I concur with the balance of the majority opinion.

ALLEGRUCCI, J., joins in the concurring and dissenting opinion of Lockett, J.

APPENDIX B

SUPREME COURT ORDER

DISTRICT CASE NO. 9607HC75

IN THE SUPREME COURT

OF THE STATE OF KANSAS

PRO SE

RAYMOND STANSBURY,
APPELLEE, CROSS-APPELLANT,

V NO. 97-79384-AS

ROBERT D. HANNIGAN, ET AL.,
APPELLANTS, CROSS-APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING AND MODIFICATION BY ROBERT D. HANNIGAN, ET AL.

CONSIDERED BY THE COURT AND DENIED.

DATE: 07/08/98.

CAROL G. GREEN
CLERK

SUPREME COURT ORDER

DISTRICT CASE NO. 96C483

IN THE SUPREME COURT

OF THE STATE OF KANSAS

MICHAEL A. BANKES,
APPELLANT,

V NO. 97-78722-AS

CHARLES SIMMONS, ET AL.,
APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING AND MODIFICATION BY CHARLES SIMMONS, ET AL.

CONSIDERED BY THE COURT AND DENIED.

DATE: 07/08/98.

CAROL G. GREEN
CLERK

APPENDIX C

SUPREME COURT ORDER

DISTRICT CASE NO. 9607HC75

IN THE SUPREME COURT

OF THE STATE OF KANSAS

PRO SE

RAYMOND STANSBURY,
APPELLEE, CROSS-APPELLANT,

V NO. 97-79384-AS

ROBERT D. HANNIGAN, ET AL.,
APPELLANTS, CROSS-APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR STAY PENDING CERTIORARI TO THE UNITED STATES SUPREME COURT BY APPELLANT, ROBERT HANNIGAN, ET AL. DENIED.

DATE: 08/05/98.

CAROL G. GREEN
CLERK

SUPREME COURT ORDER

DISTRICT CASE NO. 96C483

IN THE SUPREME COURT

OF THE STATE OF KANSAS

MICHAEL A. BANKES,
APPELLANT,

V NO. 97-78722-AS

CHARLES SIMMONS, ET AL.,
APPELLEES.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR STAY PENDING CERTIORARI TO THE UNITED STATES SUPREME COURT BY APPELLEE, CHARLES SIMMONS, ET AL. DENIED.

DATE: 08/05/98.

CAROL G. GREEN
CLERK